

**Cook Family Foods, Ltd. and International Brotherhood of Firemen and Oilers, AFL-CIO.**  
Cases 9-CA-28666, 9-CA-29116, 9-CA-29192,  
and 9-RC-15900

August 20, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On August 25, 1992, Administrative Law Judge Robert Leiner issued the attached decision. The Respondent has filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cook Family Foods, Ltd., Grayson, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We find it unnecessary to pass on the judge's finding that Supervisor Barry Forbes unlawfully interrogated employee Todd Bolling, as this finding is cumulative of other unfair labor practices found by the judge and does not affect the remedy.

*Vyrone Cravanas, Esq.*, for the General Counsel.  
*Kelvin C. Berens, Esq.* and *Mark McQueen Esq. (Berens & Tate, P.C.)*, of Omaha, Nebraska, for the Respondent.  
*John Thacker*, Business Representative, of Russell, Kansas, for the Union.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard on six occasions between June 2 and June 18, 1992, in Grayson, Kentucky, and Ironton, Ohio, upon General Counsel's second consolidated complaint and notice of hearing dated February 25, 1992, together with issues raised by certain Union (International Brotherhood of Firemen and Oilers, AFL-CIO) objections to the above-captioned election and Respondent's (Cook Family Foods, Ltd.) challenges to four ballots in the election. The consolidation of this matter was ultimately directed by the Board, adopting the acting Regional Director's report on challenged ballots and objections to the election, etc., dated November 26, 1991 (G.C. Exh. 1(v)). The consolidated complaint alleges violations of Section 8(a)(1) of the National Labor Relations Act,

as amended (the Act), as a result of alleged acts of restraint and coercion by Respondent among its employees immediately prior to the Board-conducted election in the above-captioned representation case. The complaint further alleges particular violation of Section 8(a)(3) and (1) of the Act in the discharge of five named Respondent employees.

Respondent filed timely answer to the above complaint allegations wherein it admitted certain of the allegations, denied others and denied the commission of unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to file posthearing briefs. The Union did not file a brief. Respondent's brief was timely submitted and duly considered. General Counsel's brief was untimely filed but has nevertheless been considered. On August 6, 1992, absent a showing of prejudice, I denied Respondent's August 3, 1992 motion to preclude General Counsel's brief.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, together with an evaluation of the testimony and other evidence of record, I make the following<sup>1</sup>

**FINDINGS OF FACT**

**I. RESPONDENT AS STATUTORY EMPLOYER**

The consolidated complaint alleges, Respondent admits, and I find, that Respondent, at all material times, has been and is a corporation engaged in the processing and nonretail sale of meat at its facility in Grayson, Kentucky. In the course and conduct of its business operations in 1991, Respondent purchased and received at its Grayson, Kentucky facility goods valued in excess of \$50,000 directly from points outside the State of Kentucky. Respondent concedes, and I find, that it has been and is, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE UNION AS STATUTORY LABOR ORGANIZATION**

The complaint alleges, Respondent admits, and I find, that at all material times International Brotherhood of Firemen and Oilers, AFL-CIO (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

<sup>1</sup> The underlying unfair labor practice charges filed by the above-captioned International Brotherhood of Firemen and Oilers, AFL-CIO (the Union) were timely served on Respondent on June 17, 1991 (Case 9-CA-28666); November 26, 1991 (Case 9-CA-29116); and December 31, 1991 (Case 9-CA-29192).

<sup>2</sup> The complaint alleges, and Respondent admitted in its answer and at the hearing, that the following individuals were its supervisors and agents, respectively, within the meaning of Sec. 2(11) and (13) of the Act: Tim Messick, plant administrator; Les Johnson, plant superintendent; Steve Wennerholt, director of human resources; Dave Bolio, processing manager; John Wenson, coordinator; Troy Adams, coordinator; Deb England, purchasing agent; Barry Forbes, coordinator; Fred Fischer, coordinator; David Blake, coordinator; as well as Brent Vernon, Doug Stedman, and Nick Raybourn.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Background

Respondent is engaged in the processing and shipment of hams from facilities in Nebraska, Michigan, Kentucky (Grayson), Maryland, and Pennsylvania.

In April 1991, the Union commenced organizing activities among Respondent's Grayson, Kentucky employees. These activities were conducted principally out of a rented building approximately one-quarter to one-half mile from Respondent's Grayson plant, the rented building being on the same road leading to the plant. The building is isolated, the nearest building being about 50 yards away. The organizing activities included employees handbilling coemployees before and after work on the road leading to the plant; phone calls to employees' homes, the use of bumper stickers, buttons and ultimately union "T" shirts and the use of an employee organizing committee. The first union handbills were distributed around April 14 or 15, 1991. About 20 to 30 employees openly distributed union materials up through the middle of June. Of the 20 to 30 employees who distributed union literature, 15 or so were more active than the others; among the more active were employees Carl Hale, Ramona Martin, Patty Kouns, Toby Kouns, and Sharon McGinnis.

On June 17, 1991, the Union filed a petition in the above Case 9-RC-15900 for certification in a unit comprised of:

All full-time and regular part-time production and maintenance employees, including group leaders, employed by the Employer at its Grayson, Kentucky meat processing facility excluding all coordinators, office clerical employees, professional employees guards and supervisors as defined in the Act.

A Board-conducted election was held on September 20, 1991. The resulting tally of ballots, as amended by the opening of certain challenged ballots, demonstrated that of 346 valid votes counted, 175 employees voted for the Union; 2 employees voted for an intervenor labor organization (Local 227, United Food and Commercial Workers, AFL-CIO) and 169 employees voted against the Union. There were nine challenged ballots. Five of the challenges were separately thereafter resolved, raising the votes "against" to 174. A majority of valid votes cast for the Union (175), therefore, was not a majority in view of the 2 votes cast for the intervenor (Local 227).

Meanwhile, however, as the complaint alleges, on June 14, 1991, Respondent discharged employees Toby Kouns, Patricia Kouns, Ramona Martin, and Sharon McGinnis.<sup>3</sup> When these employees attempted to vote at the September 20 election, their four votes were challenged (as part of a total of nine challenges overall). The challenges to these four ballots, together with the alleged unlawful discharges of the same employees, were consolidated in this hearing. Since these

<sup>3</sup> At the close of General Counsel's case, on Respondent's motion, I dismissed the allegation of unlawful discharge of Sharon McGinnis on the ground that the evidence adduced at the hearing demonstrated that she had voluntarily quit her employment regardless of any predetermined, uncommunicated desire of Respondent to discharge her. Her employment status will not be treated further in this decision except that Respondent's challenge to her ballot is necessarily sustained.

June 14 discharges occurred *before* the filing of the June 17 petition for certification, they do not form the basis for objections to the outcome of the election under the Board's rules. *Ideal Electric Co.*, 134 NLRB 1275 (1961) (objectionable conduct must occur between filing of petition and holding of election). However, should the allegations of the complaint be proved as to them, they would be eligible "employees" within the meaning of the Act for purposes of the election and their challenged ballots would therefore be counted in determining a majority. All parties concede that a resolution of the three remaining challenged ballots may affect the results of the election.

Furthermore, the parties are also in agreement that the Union's objections to the election "track" the allegations of violation of Section 8(a)(1) of the Act. Thus, none of the objections to the election need be treated separately from the disposition of the alleged violations of Section 8(a)(1) of the Act. To the extent proven, each violation of Section 8(a)(1) would constitute objectionable conduct. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

Lastly, at the close of General Counsel's case-in-chief, on Respondent's motion, I also dismissed two allegations of an 8(a)(1) violation: Paragraph 5(a)(i), alleging Respondent's engaging in surveillance by making written account of license plate numbers of employee vehicles displaying union campaign insignia, was dismissed for insufficient evidence; and paragraph 5(g)(ii), wherein Tim Messick, Respondent's plant administrator, allegedly threatened employees with more onerous working conditions if the employees selected the Union was similarly dismissed for failure of proof.

## Alleged Violation of Section 8(a)(1)

## 1. Surveillance; guard's use of binoculars

The complaint (par. 5(a)(ii)) alleges that in the period between the filing of the June 17 election petition and the September 20, 1991 election, Respondent's guards used binoculars to monitor vehicles entering and exiting the parking area of the Union's campaign headquarters. The evidence shows that the only access to Respondent's plant is on the road called Stevens Boulevard. About one-quarter to one-half mile from that plant is the rented facility of the Union's headquarters. Respondent's guardshack is located 30 to 40 yards from the plant itself and has an unobstructed view of the isolated Union facility. There is parking around the union hall at its front and sides.

Although several of General Counsel's witnesses testified concerning the use of binoculars by Respondent's guards, I was particularly impressed by the testimony of Esta Sexton, a currently employed first-shift employee. She testified that the guardshack contains within it a separate area called the "trucker's lounge." This trucker's lounge is separated from the guard office by a wall containing a glass window opening. On September 18, 2 days before the election, while waiting for her husband in the trucker lounge section of the guardshack, she saw a Respondent guard, in the guardshack, using binoculars watching cars go in and out of the union meeting hall area. In particular, she recalled that the guard then phoned to someone and specified the makes and models of the cars entering or leaving the union facility. These telephone calls occurred three or four times and the speaker referred only to the makes and models of cars entering or leav-

ing the union hall. She was in the guardshack for about 15 minutes and four or five cars were reported by the guard using binoculars.

Respondent's contrary testimony, elicited from David Caudill, the supervising guard at the main gate, was that he uses binoculars on many incoming vehicles and records the license numbers of any suspicious vehicles. In his 3 years of employment by Respondent, he uses binoculars at all times, perhaps once or twice a day. He denied learning the identity of employees going into or out of the union hall or recording their names or using phones to report on any such subjects to management.

Even without the fact that Esta Sexton is a current employee of Respondent and would ordinarily be hesitant in reporting such particularized facts as the guard, using binoculars, recording and reporting only the cars entering or exiting from the union hall, and doing so four or five times within the 15 minutes she was there, I would credit such particularized testimony over Caudill's denial. Furthermore, Sexton's testimony does not necessarily implicate only Caudill. She may have witnessed another guard. Certainly in the presence of her current employee status, however, I conclude that General Counsel, by a preponderance of credible evidence has supported the allegations of employer unlawful surveillance 2 days before the election. I therefore conclude that, as Esta Sexton (and Chlotene Tackett similarly) testified, Respondent, engaged in objectionable conduct affecting the outcome of the election and, in violation of Section 8(a)(1) of the Act, through its plant security guards, engaged in unlawful surveillance of its employees' union activities by using binoculars to monitor and record the vehicles entering and exiting the parking area of the Union's campaign headquarters. *NLRB v. Grover-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941). Cases cited by Respondent involving open and notorious union activities which an employer may observe without engaging in prohibited surveillance, e.g., *Baddour, Inc.*, 281 NLRB 546, 548; *Southwire Co.*, 277 NLRB 377, 378 (1985), constitute no support for Respondent's innocence here. The identity of the recipient of the phone calls is irrelevant.

## 2. Employee David Blake "physically accosted"

The complaint alleges that about September 6, 1991, i.e., after the June 17 petition and before the September 20 election, Respondent, by its "coordinator" (supervisor) David Blake, "physically accosted" an employee because of the employee's union sympathies.

William Bailey, a current employee of Respondent, testified that sometime prior to the election, on September 5 or 6, 1991 (on cross-examination Bailey admitted that it might have been as late as September 10, 1991), a coordinator (supervisor) David Blake approached him in the lunchroom. Blake was not Bailey's supervisor. Bailey, however, worked on the curing line along with Blake's wife, Brenda Blake. Brenda Blake, staunchly antiunion, testified, as did all other witnesses, that the matter of union organization and representation was a subject of frequent discussion on the work line and during break periods. On one occasion, in September 1991, before the election, she referred to the consequences flowing from a possible strike. William Bailey told her to "shut her mouth" and that her opinion "didn't matter." She told this to her husband.

Thereafter, in the lunchroom and locker room, where Blake approached Bailey, there ensued two subjects of conversation. Which of the two subjects was first raised is unclear. Respondent's supervisor, David Blake, did not testify. As I can best reconstruct the event, I conclude that, in the lunchroom, as Bailey testified, Blake grabbed at Bailey's union button and said that it was "bull shit." The button carried the inscription "vote union." Bailey then told Blake that he used to be a "good old guy" and asked whether the "red hat" (plant supervisors wear red hard hats) had caused a change in Blake. Blake answered that: "There's nobody will take food out of [my] kid's mouth. Union people sucks dicks." When Bailey left the lunchroom, Blake followed him into the locker room and, according to Bailey's uncontradicted and credited testimony, hemming Bailey up against a concrete pillar near the lockers in the locker room, again told Bailey that no "S O B would take food out of his kid's mouth"; and that it was wrong for Bailey to vote for the Union. Bailey testified he couldn't leave because Blake hemmed him in near the locker room concrete pillars. At the time of this conversation, employee Chris Stone, according to Bailey's uncontradicted testimony, was 8 to 10 feet away and that employee Jim Barry entered the locker room at the end of this locker room incident.

Bailey admitted that, during the conversation, particularly when Bailey asked Blake whether the "red hat" had changed him, Blake told him that he didn't like "people" hassling his wife. Blake then accused Bailey of hassling his wife and Bailey said he didn't hassle people that he worked with and that he respected Blake's wife.

Since Respondent previously notified its employees that they should be free from harassment and coercion not only by the Union but from their supervisors concerning their choice of accepting or rejecting union representation, Bailey reported the incident to Director of Human Resources Steve Wennerholt the next morning. He also told his supervisor, Bill Griffith, that Blake was harassing him and that he wanted to make a report of it. Griffith told him that he would set up a meeting with Plant Administrator Tim Messick.

Griffith returned and brought the entire curing line of 45 employees to a meeting with Messick. All curing line production was halted. Messick told all the employees, including Bailey, that the rumors of harassment of an employee were all untrue, "its all bull shit about Dave Blake and an associate . . . ." Messick did not name Bailey. Messick told the assembled employees that he wanted all this "stuff" to stop.

Thereafter, coordinator Griffith and Director of Human Resources Wennerholt came to Bailey to take his written statement of the events. While Wennerholt was transcribing Bailey's statement, he was laughing. Bailey told him that it was useless for Wennerholt to record Bailey's version if he thought it was funny. Wennerholt answered that if he thought "that way" about the Company, why would Bailey "want to work here?" Bailey nevertheless complained to Wennerholt that Messick called the incident "bull shit" before anybody knew what it was about. When Bailey then told Wennerholt that he had a witness to the incident, employee Chris Stone, Wennerholt told him that the matter would be checked into later. Wennerholt never got back to Bailey. There was no evidence that Wennerholt, or any other supervisor, consulted the alleged witness, Chris Stone. After this

conversation with Wennerholt, Bailey testified that he saw Blake and another supervisor laughing at him.

Neither Supervisor Blake nor employee Jim Barry were called to testify regarding this incident. Respondent called Bailey's alleged witness, Chris Stone, and Supervisor Wennerholt to testify concerning several matters but they were not questioned concerning this incident.

Plant Administrator Tim Messick testified that Director of Human Resources Steve Wennerholt investigated the matter and found that there were different accounts. Messick testified that Wennerholt spoke to employee Barry and Barry's statement resembled Blake's version which Messick found to be not threatening. In any event, Messick testified that the subject matter of the incident related to Bailey hassling Blake's wife and that Wennerholt told Messick that he thought that Bailey exaggerated the incident and therefore no further action was warranted or taken. Messick's testimony, resting entirely on Wennerholt's report, is necessarily accorded little weight. The failure to call Wennerholt and Blake clearly calls for my drawing an inference adverse to Respondent.

#### Discussion and conclusions

Bailey's testimony concerning the incident was particularized, credible as to detail, and demonstrated reasonable articulation and memory of the event. Since neither Supervisors Wennerholt nor Blake nor employees Stone or Barry ever testified concerning this incident, there is only Messick's testimony concerning Respondent's responsibility for and reaction to the incident. I infer from Messick's testimony that employee Chris Stone was not interrogated by Respondent. Employee Barry who, according to Bailey, was present only at the end of the incident, was apparently interrogated but Messick's testimony concerning Barry's interrogation is entirely hearsay and a statement of conclusions rather than what Barry told Wennerholt. Even more unsatisfactory is Respondent's failure to call its own supervisors.

Regardless that Blake may have been stimulated to confront Bailey because of what he believed to be Bailey's discourteous remarks (concerning the Union) to Blake's wife, there is no question that Bailey's uncontradicted and credited testimony was that Blake's conduct in grabbing at the union button, telling Bailey that the union was "bull shit"; that nobody would take food out of his kid's mouth; that "the union sucks dicks"; and then, hemming him against the locker, telling him that it was wrong for him to vote for the union, not permitting Bailey to leave, constituted something more than an expression of opinion from a supervisor to an employee. No matter how delicately urged and notwithstanding the prior provocation of Bailey's conversation with Blake's wife, Blake's statement and action: that it was wrong for Bailey to vote for the Union and grabbing the union button and saying that it was "bull shit" and hemming Bailey up against the concrete locker room pillar, are not the free discussion concerning contrary views on the wisdom of union representation which is encompassed in Section 8(c) of the Act. Such a physical and emotional confrontation by a supervisor against an employee, I find, is outside the bounds of protected statutory free speech and demonstrates unlawful coercion and objectionable conduct, respectively, within the meaning of Section 8(a)(1) of the Act and the timely objections filed by the Union.

Since there is no allegation relating to Wennerholt's conduct in transcribing Bailey's version of the incident, I refrain from passing on Wennerholt's comment to Bailey that if Bailey thought "that way" about the Company (i.e., Bailey being pronoun) why would you want to work here? What is, significant, is that Bailey reminded Wennerholt that Messick had called the incident "bull shit" before anybody had investigated the incident and that Wennerholt, advised of the presence of the witness, Chris Stone, said that the matter would be checked into. Wennerholt laughed at Bailey while taking his statement. Messick's testimony did not suggest that he had ever contacted Chris Stone. The fact that there was no contradiction of Bailey's testimony that Blake and Wennerholt laughed at him, apparently an uncommon experience, does not go far to support Respondent's repeated position at the hearing: that Respondent sought to protect employees' rights to select the Union as their collective-bargaining representative notwithstanding that Respondent opposed the Union and that it would not permit harassment of its employees for a pro union position. Together with the guard's telephone reporting on vehicles at the union hall, above, this evidence of Respondent's disdain undermines its professed position.

#### 3. Respondent allegedly compels wearing of its antiunion T-shirt

The complaint alleges that Respondent's supervisor, Deb England, ordered an employee to wear its antiunion campaign T-shirt (par. 5(c)).

The evidence, uncontradicted on this record, shows that employees Carolyn McBurney and Vicki Johnson were working in the supply room under Supervisor Deb England in September 1991, before the election. The Respondent intended to distribute black T-shirts (with white writing) carrying the legend "We're the family in Cook Family Foods." Supervisor England told McBurney to distribute the T-shirts 2 days before the election and to keep a log of who came by and how many employees picked up the shirts. McBurney testified that no names were kept and Supervisor England told her merely to keep a record of the sizes because everything going out of the supply room had to be accounted for. McBurney also admitted that England told her that the way she voted in the election was her own business and that she was free to speak up for or against the union.

A few days before the election, England told McBurney and employee Vicki Johnson to make sure that they wear the company T-shirt. McBurney then asked England: "Do we really"? England replied: "If I have to wear mine, you have to wear yours."

Vicki Johnson's testimony corroborates McBurney's particularly that Vicki Johnson recalls that, with Carolyn McBurney present, England told them that if she had to wear Respondent's T-shirt, so did they. Johnson, however, recalled a later conversation, before she went home (on the same day as the above conversation) when Johnson asked England: "Did you really mean it—wearing the T-shirt"? England, according to Johnson, answered "no" and Johnson did not wear the company T-shirt. Johnson's testimony, however, fails to demonstrate whether McBurney was present at this second conversation.

Supervisor Deb England did not testify in the proceeding.

### Discussion and conclusions

As far as the evidence of record discloses, there is no question that Supervisor England told employees McBurney and Johnson that they were required to wear Respondent's T-shirt (a response to the Union's T-shirt). England told McBurney, in response to McBurney's question ("do we really"?), "if I have to wear mine, you have to wear yours." England's direction to McBurney requires McBurney to demonstrate procompany sympathy and support regardless of whether McBurney had contrary sentiments. Such a supervisor direction necessarily coerces the employee into wearing a prorespondent T-shirt, demonstrating prorespondent and antiunion sentiments and necessarily restrains and coerces the employee in violation of Section 8(a)(1) of the Act and is objectionable conduct, as alleged.

It is true that Vicki Johnson testified that in a later conversation, there was an apparent retraction by England of the obligation of Johnson to wear the shirt. There was no showing, however, that McBurney was present or otherwise heard that England had retracted the statement. Therefore, assuming that Supervisor England's statement to Johnson that she need not wear the shirt constitutes a sufficient repudiation of the prior unlawful direction to wear the shirt, since there was no showing that McBurney was ever advised of this apparent retraction, it is not a retraction as to McBurney whose Section 7 rights were already substantially invaded, within the meaning of Section 8(a)(1)'s prohibition against restraint and coercion.

#### 4. Alleged interrogation in violation of Section 8(a)(1)

##### Supervisor Barry Forbes

Lauretta Holbrook, a current employee of Respondent at the time she gave testimony, testified that one day before the September 20 election, her supervisor, Barry Forbes, asked her how three of her fellow employees were going to vote; and he told her that if he could not report on how they were going to vote, he would lose his job. Holbrook told him that he was better off not knowing "in your position."

Todd Bolling, also presently employed by Respondent at the time he gave his testimony, testified that one day before the election, his Supervisor Barry Forbes saw him wearing the union T-shirt. Forbes told him that he was wearing the wrong shirt and asked him if he was going to vote for the union. Forbes told him that he was going to vote for the union. Forbes then asked him to wear the Company button (vote no) and Bolling refused.

In response to questions on cross-examination, Bolling testified that Respondent told its employees to vote in their own best interest; that a company poster told employees that voting for or against the Union was a privilege which would be protected and that the Company would honor their vote. He denied recalling any suggestion that if he voted for the Union he would be protected and did not hear the Company say that it would attempt to negotiate a collective-bargaining agreement if the Union won the election.

Supervisor Barry Forbes did not testify in the proceeding.

### Discussion and conclusions

The uncontradicted testimony of Lauretta Holbrook and Todd Bolling is credited. Supervisor Forbes' questions as to

how other employees would vote and whether Bolling, in particular, would vote for the Union are all none of the supervisor's lawful business and are coercive invasions of employees' Section 7 rights, violating Section 8(a)(1) of the Act, and, in the instant case, objectionable conduct. Moreover, Forbes' attempt to cause Bolling to wear a union button, under the circumstances of unlawful interrogation, is a further violation of Section 8(a)(1) of the Act. In view of Respondent's repeated suggestions, at the hearing, as noted above, with regard to Wennerholt's and Blake's laughter directed to employee Bailey's complaint, that its antiunion stance did not include unlawful conduct, necessarily makes Lauretta Holbrook's testimony concerning her conversation with Forbes an ominous contradiction of Respondent's position. Thus the record stands that Supervisor Forbes told Holbrook not only that he wanted to know how three employees were going to vote, but that if he couldn't report on that point, he would "lose his job." I find that on September 19, 1991, the day before the election, Forbes unlawfully interrogated employees Holbrook and Bolling within the meaning of Section 8(a)(1) of the Act, such activity constituting objectionable conduct as alleged.

#### 5. Alleged taking of names of and threatening union supporters

The complaint (pars. 5(e) and (f)) alleges that about September 18, Respondent, by its Supervisors Les Johnson and Troy Adams, wrote down the names of union supporters: Johnson on the road in front of the Union's campaign headquarters; Adams at Respondent's Grayson facility, where he impliedly threatened union supporters with unspecified retaliation.

##### a. *The activities of Supervisor Troy Adams*

With regard to Troy Adams' activities, employee Wanda Erwin credibly testified that while she and other employees were working on the production line, her supervisor, Troy Adams, approached them with a pencil and paper, writing down names. When Wanda Erwin asked him why he recording the names, Adams said that it was "you people wearing union shirts." Erwin told him that she could transfer out of his line to which Adams replied: "no you can't; I have to give the okay."

John Rogers, currently employed by Respondent at the time he gave testimony, testified that while he was working on his second shift on the converting line in the week prior to the election, his supervisor, Troy Adams was taking the names of employees wearing union shirts, including Lauretta Holbrook, himself, Glenn Elkin, and Larry Hale. After he apparently recorded the names, he handed the list to Supervisor Doug Stedman. About a half-hour later in the "break room," while Rogers, Hale, Holbrook, and other employees were sitting at a table, Adams approached them and said: "I will remember the ones who have the shirts on. No matter how this thing goes, if the Union gets in, you'll have to work for me."

Diana Bryant, currently employed by Respondent at the time she gave her testimony, testified that while she was working her second shift on the converting line in the week prior to the September 20 election, on the night the employees wore their pronoun T-shirts (apparently the night of Sep-

tember 18, 1991) Supervisor Troy Adams approached and asked her if she was wearing a union shirt. When she said that she was wearing a union shirt, he said: "your name goes on my list too." Bryant asked: "what list is that?" and Adams replied: "a list of people that I will remember come Monday morning," i.e., following the Friday, September 20 election. Nearby employee Cathy Stephens asked Adams: "for what reason?" and Adams replied for "personal reasons." When she then asked him what his "personal reasons" were, he said: "Monday, you all [will] be working for me, union or no union and I will remember the ones that wore the blue [union] shirts" (Tr. 191).

Supervisor Troy Adams was not called to testify in the proceeding.

#### Discussion and conclusions

The uncontradicted testimony of employees Rogers, Bryant, Stephens, and Erwin is all mutually corroborative and credible. I thus conclude, consistent with their testimony, that on or about September 18, 1991, 2 days before the Board-conducted September 20 election, Supervisor Troy Adams recorded the names of employees demonstrating support for the union by wearing blue union T-shirts; transmitted the list of names to another supervisor, Doug Stedman; told the employees that he was transcribing their names because they were wearing the blue prounion T-shirts; and told them that the reason he was engaging in this conduct was that he would remember the employees who were wearing the prounion T-shirts; particularly because they would still be working for him on the following Monday morning whether the union won or lost the election.

This Adams' conduct demonstrates not merely a series of listings in violation of Section 8(a)(1) of the Act, but an uns subtle threat of retaliation because of employee support of the union. Any doubt whether the employees recognized Adams' retaliatory threat comes from the uncontradicted Wanda Erwin testimony. When he told them that he would "remember" who had worn the T-shirts when they returned to work for him on the following Monday, Wanda Erwin immediately recognized the threat and told him that she could be transferred off of his production line. He reminded her that she could not do so without his permission (Tr. 95). Greater evidence of coercion and restraint is unnecessary. I therefore conclude that Respondent, by Troy Adams, unlawfully recorded the names of union supporters and threatened them with retaliation of an unspecified nature regardless of the outcome of the union election. This conduct, as alleged in paragraphs 5(e) and (f), violates Section 8(a)(1) of the Act and constitutes objectionable conduct as alleged.

#### b. *The activities of Supervisor Les Johnson*

Lauretta Holbrook and Chlotene Tackett, presently, employed at the time they gave testimony, testified that they handbilled for the union almost every day. Aside from seeing a female guard watching them through binoculars on several occasions before the election and watching the binoculars trained on other employees handbilling, they saw Les Johnson (Respondent's plant superintendent, apparently subordinate only to Plant Administrator Tim Messick) drive up to the plant on most mornings that she was handbilling. He slowed down and recorded things on a yellow pad.

Les Johnson testified that he saw employees handing out literature on the road leading to the plant; that he talked to them; that he never wrote down the names of the handbillers but did write the legends of the picket signs at the picket line. He testified moreover, that he did this on one occasion, did not stop but admitted he slowed down and drove through the line. He also testified that he reported his conduct to the plant administrator, Tim Messick.

#### Discussion and conclusions

Despite the fact that there is no evidence that the Union ever employed picket signs at or near the road leading to Respondent's plant and notwithstanding that Les Johnson, according to Lauretta Holbrook, cruised past them on five occasions, there is no proof, even on a prima facie basis, that what Les Johnson was writing on his yellow pad were the names of the handbillers. Indeed, the identity of the handbillers could easily be ascertained through the same binoculars that General Counsel was accusing Respondent's guards of unlawfully using in other sections of the consolidated complaint.

Johnson testified that he was recording only the picket sign legends that the employees carried. There is insufficient evidence, prima facie, to prove that he was recording handbillers' names. While it is suspicious that he cruised back and forth on more than one occasion, according to Holbrook (notwithstanding his denial), I find it improbable that he was recording names. What he may have been doing, on the other hand, was seeking to intimidate the employees by his cruising up and down and feigning his recording either their names or other elements. While it may be argued that this is within the ambit of the allegations of the complaint, there is no proof supporting such a speculation. Thus, when the implausibility of the necessity of Johnson recording names is added to the fact that the names of the handbillers could easily be obtained through binoculars, I conclude that General Counsel has failed to prove, by a preponderance of the credible evidence, a prima facie case to support the allegation that, on or about September 18, in violation of Section 8(a)(1), Les Johnson was recording the names of union supporters. I not only recommend that the allegation of unfair labor practice be dismissed but note that there was no indication of when Les Johnson was alleged to have engaged in this activity, i.e., whether before or after the filing of the June 17, 1991 petition for certification. In short, I recommend that both the complaint allegation and the corresponding election objection be dismissed for want of proof.

#### The September 18 and 19, 1991 preelection speeches of Plant Administrator Tim Messick

As above noted, the election was on Friday, September 20, 1991. On the preceding Wednesday and Thursday (September 18 and 19, 1991) Respondent held four meetings of its employees, two on Wednesday and two on Thursday (Tr. 1868-1869). Unlike previous meetings called by Respondent at which it discussed the upcoming union election with its employees, at these four meetings, there were no question and answer periods permitted (Tr. 1870). It was at these meetings that employees Carl Hale and William Bailey attempted to ask questions and were told to shut up and to sit down.

Employee Wanda Erwin testified that at a September 18 meeting, Attorneys McQueen and Berens together with Plant Administrator Tim Messick, addressed 35 to 40 converting line and curing line employees at about 5 p.m. After showing a movie concerning labor relations at Respondent's Michigan plant, Plant Administrator Messick, according to Wanda Erwin, told the employees that: "if [the Union were] voted in, [Respondent] would move out the plant in 48 hours, back to Michigan if the union was voted in."

On cross-examination, Erwin denied having been told, at company-sponsored meetings, that the choice of voting for or against the union was up to employees, denied that the Respondent stated that employees should feel free to talk about the Union if they supported it and free to talk against the Union if they did not support it; and could not recall whether she attended only three or four meetings or perhaps more. She did insist, however, that at the meeting 2 days before the election, Plant Manager Messick said that if the Union was voted, in, Respondent would move the factory out within 48 hours, back to Michigan (Tr. 102). She denied that Messick said that Respondent "could move the plant back to Michigan in 48 hours; rather, that if the Union was voted in, Respondent "would move it out within 48 hours" (Tr. 103). When Respondent counsel asked if she were positive that Plant Administrator Messick made this statement in the 10 minutes that he spoke after the film, she said she was positive (Tr. 103).

Employee Laurretta Holbrook testified, in response to Respondent's questions, that Respondent did tell employees that, however they voted, they would always have a job at Respondent; but also recalled that either Attorney Berens or Plant Manager Messick, at a meeting at which both spoke, said that "if the union came in, the plant could very easily move back to Detroit within 48 hours." While she was not sure whether it was Messick or Attorney Berens who said it, she recalled the "48-hour comment" only because Respondent asked about it on cross-examination (Tr. 148).

Employee William Bailey testified that the company meeting he attended, with about 45 or 50 employees present, was on the day before the election, in the morning (Tr. 252-253). He recalled that after the showing of the movie, "they were talking about moving the plant back" (Tr. 254). Bailey testified that Messick said that "they could—he said he would, move the plant back in 24 hours if it turns [out] to be a union plant" (Tr. 255); and that Messick did not mention where they would move the plant to (Tr. 255). Bailey was an outspoken union supporter, wore a union T-shirt and was one of many employees on the union organizing committee. Respondent did not explore Bailey's testimony concerning Messick's statement.

#### Testimony of Plant Administrator Tim Messick

Messick testified that in response to the union organizing drive, Respondent commenced holding meetings with its employees in April or May 1991 (Tr. 1848). At the same time, he informed his supervisors, after consulting counsel, that they were not to spy on, make promises to, interrogate or threaten any of the employees concerning their union activities (Tr. 1849). At employee meetings, Respondent told the employees that in the event that they were threatened, they should contact someone in management because management

would not tolerate threats in any way from any individual who supported the union or was nonunion (Tr. 1849-1850).<sup>4</sup>

With regard to the speeches made in the four meetings on the last 2 days prior to the election, Messick testified that he didn't use the expression "48 hours"; asserted that it was only Attorney Berens who used that expression; and that the substance of the speech was not consistent with the testimony of General Counsel's witnesses. Rather, because there had been a report to his supervisors that some employees believed that if the Union were elected on Friday (September 20), there would be a strike on Monday (September 23), Berens told the employees (in Messick's presence) that he hoped that there would not be a strike; that in any event the plant would continue to operate in Grayson; that production would be continued by management staff and any employees who crossed the picket line; and that if production was insufficient at the Grayson plant, Respondent would produce hams at its plant in Lincoln, Nebraska (Tr. 1854). Messick testified that Berens also told the employees: "We could possibly open Detroit in 48 hours if it was necessary" (Tr. 1854). In particular, Messick testified in response to the question of whether he spoke of the reopening of the Detroit plant: "No, sir. I don't think so" (Tr. 1854). When the quality of his answer, apparently both emphatic and hesitant at the same time ("No, sir. I don't think so") was called to his attention as presenting a difficult question for resolution,<sup>5</sup> Messick, pressed on the record for a particularized answer, stated: "No, I don't think I did. I'm sure I did not" (Tr. 1855). He then settled into specific denial: "I am sure I did not" (Tr. 1855). He specifically denied that there was any discussion at the meetings concerning relocating the plant if the union was elected (Tr. 1855). No supervisor testified of having heard anyone say that if the Union were elected, there would be a strike. Messick's testimony of such a report is uncorroborated.

Respondent's witness, employee Chris Stone, testified that Messick told the assembled employees that Respondent could open the plant in Detroit in 48 hours (thus contradicting Messick on whether Messick mentioned the reopening of the Detroit plant in 48 hours).

Respondent's witness, Brenda Blake, testified that Attorney Berens told the employees that, in the event of a strike, the Detroit plant could be opened in 48 hours in order to continue production. Thus, Brenda Blake testified concerning what Attorney Berens said rather than what Messick said.

<sup>4</sup>I have already noted Respondent's failure to contradict or avoid the evidence of its supervisor, Barry Forbes, complaining that if his interrogation of employees proved unsuccessful, he could lose his job. In view of the credited testimony of William Bailey concerning the treatment he received from Supervisors Wennerholt and Blake including the nonchalant and, at times, derisive response to his report of being harassed by Supervisor Blake, and in view of the credited (uncontradicted) evidence that Messick characterized Bailey's complaint as "bull shit" before Wennerholt even investigated the matter, I do not credit the sincerity of Messick's requesting employees to report incidents of threats and harassment to upper management.

<sup>5</sup>Messick also at first testified that there was a question and answer period in the four meetings immediately prior to the election (Tr. 1855), but thereafter recalled that there was no question and answer period in any of the four meetings immediately prior to the election (Tr. 1869-1870).

Similarly, employee Elaine Dickerson testified what Berens said rather than what Messick said. No supervisor testified concerning what Messick said.

Thus, the only employee witness called by Respondent, Chris Stone, who testified concerning what Messick told the employees at the meeting, contradicted Messick's testimony. Whereas Messick testified—ultimately—that he never mentioned “reopening the Detroit plant in 48 hours (Tr. 1855). Stone testified that Messick said that the Detroit plant could be reopened in 48 hours if there was a strike (Tr. 1177).

#### Discussion and conclusions

Employee *Wanda Erwin* was emphatic, unconditional, and positive in her testimony that Respondent would move Respondent's plant back to Detroit, Michigan, if the Union was voted in (compare: Tr. 93 with Tr. 102–103). I observed that Wanda Erwin was militantly prounion and was prepared to discount her testimony, in some part, on that basis, especially in view of her admission that she was not only no longer employed by Respondent but was totally disabled and would be unable to return to Respondent's employment (Tr. 85–86).

On the other hand, *Lauretta Holbrook* admitted that the Respondent told her that regardless of how she voted, she would always have a job at Respondent (Tr. 147), and that either Messick or Attorney Berens said (Tr. 147–148) that if the Union came in, the plant could very easily move to Detroit within 48 hours. Her testimony, like Wanda Erwin's, was unconditional and emphatic. Indeed, she testified, credibly that she failed to mention this 48-hour threat of reopening the Detroit plant to the Board agent during investigation but mentioned it at the hearing only because Respondent inquired of it on cross-examination (Tr. 147–148). I credit her testimony that either Berens (in the presence of Plant Manager Messick) or Messick himself made the statement. Unlike witness Wanda Erwin, Lauretta Holbrook was currently employed by Respondent at the time of giving her testimony and testified within 10 or 15 feet of Plant Manager Messick who was in attendance at the hearing at all times. On this basis, and in view of Respondent's obvious antiunion stance, whether or not the attitude was always lawfully expressed, witness Holbrook's testimony should be given special consideration in terms of its credibility.

*William Bailey*, though an outspoken union advocate, was, like Lauretta Holbrook, presently employed by Respondent and testifying in the presence of Plant Administrator Messick. Notwithstanding his overt union activities and prounion stance, he appeared to me to be somewhat reluctant in testifying in the presence of Messick. Thus he could not at first recall what he had divulged to the NLRB during the investigatory stage which appeared in his affidavit. He finally testified, without further prompting, that: “they were talking about moving the plant back” (Tr. 254). In particular, he then testified (Tr. 255) that Plant Administrator Messick said: “they could—he said he would, move the plant back in 24 hours if it turns to be a union plant.” Although he testified that the period mentioned was 24 hours rather than 48 hours (which I find was actually said by Messick) and did not recall *where* the plant would be moved back to (Tr. 255), there was no question in his direct or cross-examination that it was Plant Administrator Messick (rather than Attorney Berens) who had made the statement concerning moving of the plant if the Union were voted in.

Respondent's witnesses, Brenda Blake and Elaine Dickerson, testified concerning what Attorney Berens said rather than what Messick said at the meetings. Chris Stone, as above noted, fatally contradicted Messick's denial of having mentioned reopening Respondent's Detroit plant in 48 hours in his speech at the meetings immediately before the election.

In view of Bailey and Holbrook, current employees, testifying in the immediate presence of and against the interest of their employer's chief supervisor; in view of their essentially corroborating Wanda Erwin's similar testimony; in view of Stone's materially contradicting Messick's denials; and in view of Messick's original hesitant and equivocal denials of having even mentioned reopening the Detroit plant or a time period, I do not credit Messick's testimony that he did not mention reopening the Detroit plant or a time period; and I further do not credit his testimony that Berens and Berens alone mentioned the reopening of the Detroit plant in 48 hours. In view of all these circumstances, I credit General Counsel's witnesses and find, as alleged, that on September 18 and 19, 1991, 2 days before the Board-conducted election of September 20, Respondent, through Messick, in violation of Section 8(a)(1) of the Act (and thus also committing objectionable conduct for purposes of setting aside the election), threatened its employees that Respondent would relocate its facility if the employees selected the Union as their bargaining representative.<sup>6</sup>

Patricia Kouns, Toby Kouns, and Ramona Martin<sup>7</sup>

The hiring, union and concerted protected activities of Ramona Martin, Toby Kouns, and Patty Kouns

#### (1) Hiring and union and protected activities

Ramona Martin, Patty Kouns, and Toby Kouns were all hired in May 1991: Ramona Martin and Patty Kouns on May 13; Toby Kouns on May 3, 1991. They were all discharged, consecutively, on June 14, 1991. All were hired to work on the “curing” production line which involved principally the “bagging” of hams. As I understood the testimony, the eight or more bagging employees on the curing line picked hams off of the moving belt and placed them in bags. That moving belt was itself fed from another moving production line wherein the hams were injected with various solutions for preservation and other purposes (the “Koch machine”). The two lines apparently ran independent of each other so that the belt of hams ready for bagging could be run independently of the production of hams. Thus, if the bagging of hams ran behind the number of hams coming out of the Koch machine, the ham production line could be stopped and the bagging line continued so that the bagging operation could keep up with ham production.

In the Grayson plant, the first level supervisors are called “coordinators.” John Wenson was the “coordinator” for the

<sup>6</sup> At the conclusion of General Counsel's case, as above noted, I dismissed, as unproven, General Counsel's further allegation that on September 20, 1991, Messick threatened employees with more onerous working conditions if they selected the Union as their bargaining representative.

<sup>7</sup> As above noted, I dismissed at the close of General Counsel's case the allegation that, on the same date, June 14, 1991, Sharon McGinnis was also unlawfully discharged.



curing line and the direct supervisor of Toby Kouns, Patty Kouns and Ramona Martin. Two nonsupervisors regularly assist the "coordinator" in the proper running of the curing line: the two nonsupervisory "group leaders," Bill Griffith and Christine Hale. Among the functions of the group leader is to time the production of each of the curing line employees, to instruct the employees in the operations of the job, and to counsel them in case their production was inadequate. An acceptable rate of production for curing line baggers was about seven or eight hams per minute. Ramona Martin testified without contradiction that after her first week, when she bagged four to five hams per minute, she was timed by Christine Hale at 10 to 14 per minute. Toby Kouns testified without contradiction that Chris Hale told her that she was bagging 10 to 12 hams per minute and Patty Kouns testified that Chris Hale told her that John Wenson himself had timed her at 10 to 11 bags per minute. All three testified that prior to their June 14 discharges, they had never been disciplined or counseled (orally) for the speed of their bagging production. Toby Kouns ate lunch with Ramona Martin and Patty Kouns about twice a week but it was only in the last week of their employment that they worked constantly together on the line. She met them on the first day of their employment (May 13) but became acquainted while working on the line and handing out union leaflets.

## (2) Union activity

Union organizational activity among Respondent's employees started in April 1991. Ramona Martin first became involved with the Union at the end of May when she signed an employee petition in favor of the Union. She stood next to Patty Kouns who distributed handbills on the road leading to the plant from the nearby union headquarters. Patty Kouns' distribution of leaflets occurred both in the morning before work and in the afternoon or evening after work. At the beginning of June, at lunchtime, in the cafeteria, she, Brenda Blake, Toby Kouns, Ramona Martin, and Sharon McGinnis were at a table with several newly employed female employees. Seated together about 9 feet away were coordinator John Wenson, coordinator-trainee Bill Griffith, and two members of Respondent's supervisory hierarchy, Les Johnson, the Plant Superintendent, and Dave Bolio, the Plant Processing Manager. Her testimony is that these supervisors at the nearby table were staring at them while they sought to have the new employees sign a union support petition. One of the two new employees, "Gloria"—then signed the union petition and passed it to another new employee who did not sign it.

Toby Kouns testified that her union activities commenced about a week after she started work (May 3, 1991). Thus, in or about May 10, both before and after work, she handbilled employees proceeding to and from the plant on the road between the Union's headquarters and the plant itself. Plant Administrator Tim Messick, coordinator Wenson, and Plant Superintendent Les Johnson saw her distributing the handbills. As above noted, although she worked regularly with Ramona Martin and Patty Kouns, it was only in the last week of their employment (June 7–14) that they worked constantly together notwithstanding that they were at lunch about twice a week.

Patty Kouns testified that she, also, distributed union leaflets on the road to the plant and helped circulate employee

petitions and spoke to coworkers in favor of the Union. Corroborating Ramona Martin, she testified that she signed up an employee for the Union at the lunch table in the cafeteria in the presence of Supervisors Wenson, Bolio, and others. She testified it was she who passed around the petition at the table with the supervisors silently observing the transaction. Patty Kouns placed this event as occurring around June 12, 1991, and acknowledged that it was not only she who circulated the petition but that she and Sharon McGinnis did so. She also recalled that Brenda Blake, an employee like herself, left the table (at which Toby Kouns, Patty Kouns, and Ramona Martin was sitting) to join the supervisors at the supervisory table. Brenda Blake's husband is a supervisor at the plant.

At the end of 3 weeks of employment, thus around June 7, 1991, Patty Kouns (with other employees) was directed to meet in the office of the highest plant supervisor, Plant Administrator Tim Messick. The posttraining meeting of these employees with Messick is called the "milk and cookies" meeting. Messick asked Patty Kouns if everything was okay; how she felt about the Company and whether she was happy as an employee. The conversation then turned to the question of the Union. Union activity among the employees was a common matter and employees in the plant openly took positions for and against the Union. Patty Kouns asked Messick why Respondent, in view of the Union's desire to debate the Company, failed or refused to debate the union. Messick's reply was that he felt about the Union like he feels about vacuum cleaner salesmen: they never get a foot into his doorway.

Union Representative John Thacker testified that perhaps 250 of the 700 or more Grayson employees distributed union literature; approximately 50 employees returned petitions on which union support was recorded; and that there were 25 or more employees on the union's organizing committee including Carl Hale (husband of group leader Christine Hale), Toby Kouns, Ramona Martin, Patty Kouns, and Sharon McGinnis. There was no proof of Respondent knowledge of their positions on the organizing committee.

## (3) The testimony of group leader Christine Hale; union animus

Christine Hale became a group leader in May 1991 on the curing line. She knew Ramona Martin and Toby and Patty Kouns as employees on the curing line.

The uncontradicted and credited evidence shows that on or about May 23, 1991, she overheard "coordinator" John Wenson tell his other group leader, Bill Griffith, that he was going "to throw a . . . bitch fit . . . against the girls who were out handbiling (Tr. 500–502). He specified that the girls who were doing the handbiling were Ramona Martin, Patty Kouns, Sharon McGinnis, and Toby Kouns (Tr. 505). About 2 hours after she overheard Wenson's remarks, she repeated them to the four female employees who were the object of Wenson's "bitch fit" remark (Tr. 506) and to other employees as well.

While I noticed some hesitancy in Christine Hale's recounting these events (notwithstanding that she testified in support of the alleged unlawful discharge of her husband, Carl Hale), there was no reluctance in the corroboration of Hale's testimony by former curing line employee, Betty Jo McHenry. McHenry testified that on May 23, Ramona Mar-

tin, Patty Kouns, and Toby Kouns were “out there” distributing union literature. On that day, her group leader, Christine Hale, told her and her curing line fellow employee “Melissa,” that Wenson said that he was “going to throw a fit but it would not be directed at me and Melissa and for us not to pay any attention if he did throw one” (Tr. 1149). Hale told Melissa and McHenry that they were not to pay attention to the fit because it was not to be directed at them (Tr. 1150), but that Wenson was “really upset because the girls [were] out on the street handing out papers (Tr. 1151). . . handing out the union literature” (Tr. 1153). McHenry testified that Supervisor Wenson appeared to her to be upset, pacing back and forth (Tr. 1153).

(4) Ramona Martin’s arm injury; MSDS sheets and other protected concerted activities

(a) *Martin’s arm injury and the demand for MSDS sheets*

On June 3, 1991, Ramona Martin had cuts on her hands due to work activities. On June 4, Ramona Martin, using an allegedly too short shovel, hurt her arm shoveling ham hocks. She told her group leader, Bill Griffith, who advised her to see the coordinator John Wenson. Wenson told her to visit the human resources department and speak with Supervisor Raybourn. In Raybourn’s absence, the clerical in the department gave her Tylenol and Martin returned to work. By Friday, June 7, Martin noticed that her right hand was swollen inside the glove and again informed the group leader, Griffith, who sent her again to see Supervisor Raybourn in the human resources office. Her hand was hot and swollen and Raybourn advised an ice pack; and if it was not better by lunchtime, she should return to the office. The hand did not improve and she returned to the office. She then went to see Supervisor Wenson in the cafeteria. He told her that her condition looked like a “salt infection.” He told her to return to work and she did so. Accompanied by Supervisor Wenson, they visited Supervisor Raybourn. He told her it was a salt infection and she questioned whether she had better go to the doctor. Raybourn advised waiting a few days and sent her home at 5 o’clock whereas her normal quitting time was 8 p.m. He told her to soak her arm in warm water (Wenson apparently advised her to soak her arm in cold water).

On the same day, she called her doctor who, having mentioned that salt does not cause infections, advised her to discover what it was in the curing juice solution that might react adversely against her. At that point, at about 7:30 p.m. on Friday, June 7, she telephoned the plant and asked for the MSDS sheets: the “Material Safety Data Sheets” sheets which OSHA requires that each manufacturer keep at hand to provide employees with information concerning the materials with which they work. There was nobody at the human resources office at this time.

On Monday, June 10, she went to work and spoke to Supervisor Wenson. She told him that her doctor wanted to know of the materials used in the curing line juice. Wenson told her that there was nothing in it but salt and water. When she went to work that day, she visited the human resources office and asked Human Resources Director Steve Wennerholt for the MSDS sheets for her doctor. He told her that he had none available at the time.

Some days before, after she had injured her arm and vainly requested the MSDS sheets, her husband had telephoned OSHA to determine the employer’s obligation to supply the sheets. Martin testified that OSHA suggested that she ask for the MSDS sheets again and, if refused, make a written request in the presence of witnesses.

At 9 a.m., on Wednesday, June 12, Ramona Martin, together with Patty Kouns and Sharon McGinnis, entered the human resources office. Martin asked for Supervisor Wennerholt and was told he was not there. She then handed her written MSDS request to the secretary in the office. She told the secretary that she needed the MSDS sheets by that evening. The secretary told her that the supervisor who had the sheets, Nick Raybourn, was out of town and that it was unlikely that she would get the sheets.

At 1:30 p.m. on the same day (Wednesday, June 12) on her lunchbreak, she went to Wennerholt’s office and asked for the MSDS sheets. He told her that he did not have copies of the sheets at that time. At this lunchbreak she, Patty Kouns, Toby Kouns, and Sharon McGinnis were observed by supervisors at a nearby table, attempting to cause new employees to sign a petition in support of the Union.

On the next day, Thursday, June 13, she again went to the human resources office in the morning before 10 a.m. (her starting time was at 10 a.m.) and asked Wennerholt for the MSDS sheets again. She could not recall what his response was but she did not get the sheets.

Later that day, at about 4 p.m., at breaktime, Ramona Martin, in the company of Sharon McGinnis, Toby Kouns, and Patty Kouns, spoke to Processing Manager Dave Bolio in the cafeteria.

The afternoon cafeteria conversation between Supervisor Bolio and the four employees resulted from events earlier that day. When these employees reported for work, the air-conditioning on the curing line caused the temperature to be very cold. After they complained to newly promoted coordinator Griffith, he arranged at their request a meeting with Bolio. They told Bolio that they had not been permitted their usual 10-minute break, that the temperature on the line was too cold, and that the line was being operated faster than usual. Bolio told them that the blowers could be shut off. Martin mentioned to Bolio that the employees on the line were acting rude to the three of them as if they were going to be fired. Bolio told her that she was not going to be fired and said “you girls are good workers” (Tr. 814). The employees then returned to work and the blowers were turned off.

In the prior week, when the baggers on the curing line, Toby Kouns, Ramona Martin, Patty Kouns, Sharon McGinnis, and other employees were sent over to the “converting line” because of a need on the converting line for further help. They worked under group leader Brenda Hammons. On one occasion, Brenda Hammons told her that she thought that Ramona Martin was a good worker; indeed, she told her that of all the employees sent over on that occasion, she was the best of all of them. Group leader Hammons asked her if she wanted to be transferred to the converting line and whether she should ask Supervisor Wenson for the

transfer. Martin testified that she merely grinned at Hammons and said nothing.<sup>8</sup>

With the blowers turned off, as above noted, the curing line employees who had spoken to Bolio returned to work and finished their shift at 8 or 8:30 p.m. that Thursday evening.

The discharges of Ramona Martin, Toby Kouns, and  
Patty Kouns

On Friday, June 14, *Ramona Martin* came to work at the starting time of 10 a.m. and together with the other curing line employees worked until lunchtime. After lunch, at about 1:30 p.m., as she was returning to the curing line, coordinator Griffith told her that she was wanted in the human resources office. Griffith had become a supervisor and a coordinator on June 12. When she entered the office, Supervisor Wennerholt told her that she was going to be terminated as of that moment. He told her that she had slowed down production to bagging about 2 to 2-1/2 hams per minute. Martin denied that and asked him who told him that. Wennerholt did not respond. He then told her he had tried her out on another line and that she did not work out on that line either. Martin responded by telling him that group leader Brenda Hammons had told her that she liked Martin to work on her line. Wennerholt said that Brenda Hammons had not told him that, directly implying that Hammons had told her the opposite. Wennerholt told Martin that she should leave the building immediately. She cleaned out her locker, then returned to the human resources office and asked Wennerholt for the MSDS sheets. He gave her some MSDS sheets but Martin said they were not curing line sheets. Wennerholt told her that if he got the curing line sheets, he would mail them to her.

*Toby Kouns* testified that at about 1:20 p.m. on that same Friday, June 14, Supervisor Griffith told her to go to the human resources office. He accompanied her. There, she found Wennerholt who told her that he was terminating her and had two major complaints against her. He said that every time her coordinator left the work floor, she slowed down her work. When Toby Kouns asked him who had seen her slowing up on her work, Wennerholt said that he himself had seen her together with Tim Messick.<sup>9</sup>

In response to Wennerholt's identifying the supervisors who had seen her slow up, Toby Kouns said: "whoever had said that, to bring them up to my face and . . . let them tell me to my face that I didn't do my work" (Tr. 867).

<sup>8</sup>To the extent that Brenda Hammons testified that she made any such statement sarcastically, and indeed, threatened Martin with the statement that if she had been working under her (Hammons') control, she would get more work out of Ramona Martin, I discredit Hammons' testimony. Similarly, I do not credit her testimony that all four of the employees were worthless. That they may not have been paragon employees is another matter.

<sup>9</sup>Although the matter is not determinative, there is no suggestion in the record, other than this reference to Plant Administrator Tim Messick, that Messick was one of the supervisors who observed her on the line. Either Wennerholt's recollection is mistaken, Kouns' recollection is mistaken, or Wennerholt created a gratuitous addition to the number and identity of the supervisors who had observed the employees on the curing line, particularly the three alleged discriminatees herein, do their work on the days before the June 14 termination.

Wennerholt said that he could not do that. Kouns then asked to keep her job because she liked it and asked for the opportunity to "prove myself" (Tr. 867). She said that if she didn't do what she said she would do, she would quit and that Respondent would not have to fire her. Wennerholt told her that he would speak to supervisors and group leaders and see what they had to say and directed her to call him back on the following Monday for an answer (Tr. 867).

At this point, Kouns testified that she considered the conversation to be at an end and asked Wennerholt whether it was. He said it was the end. When she stood up to leave, she remembered that he had never told her what the other complaint was against her. She testified that he then repeated a phrase which he had already used in their conversation. Thus when she told him that he had forgotten to tell her the second complaint against her, he said: "Well about all I can say is we got to watch who we're with; we got to watch the company we're with" (Tr. 868). Kouns walked out and Griffith left with her.

During the conversation, however, when Toby Kouns protested that she bagged more than 7 hams per minute and had been timed at doing 10 or more hams per minute (Tr. 869), and that, indeed, she had been timed at that rate only the day before (June 13) (Tr. 870), Wennerholt asked Griffith if Kouns' statement was true and Griffith said: "Yes, she does the standard" (Tr. 870).

*Patty Kouns* testified that Ramona Martin hurt her wrist on June 4, 1991, while shoveling hamhocks. Later, she recalled seeing Martin's arm swollen and having a "green" color. She saw her leave the line and speak to coordinator Wenson. She further testified, corroborating Martin, that on June 12, around 10 a.m., before they started work, Martin asked her to be a witness and go with her to the human resources office where she would present a written request for the MSDS sheets. Together with Sharon McGinnis and Ramona Martin, Patty Kouns went to the office and there saw Martin hand to the blonde office clerk the written request for the MSDS sheets.

Patty Kouns also testified that on June 13, the day before her discharge, at the start of the workday, it was very cold on the bagging line. She, like Ramona Martin, complained to various persons on the line including the maintenance man about the blowers on the air-conditioner, and testified, without contradiction, that the conveyor belt went faster after lunch than it had ever done, causing the hams to knock into each other. It was so cold that she got all her clothes on. For the first time in her working experience, there was no 10-minute break at 3:30 p.m. She recalled that Griffith told her that Supervisor Wenson said there would be no breaks until all the hams had been bagged. At this point, Sharon McGinnis told Griffith that they needed a break and when Griffith refused, she asked him to get Supervisor David Bolio down to the line. Griffith said that he would see about it and thereafter, at about 5 p.m., told the employees that he had set up a meeting with Bolio. As with Ramona Martin's testimony, she testified that they met with Bolio in the lunchroom (Sharon McGinnis, Toby Kouns, Ramona Martin, and Patty Kouns). Bolio came over to their table and they told them of the cold air-conditioning; the failure to have a break and the speed of the conveyor belt. Bolio told them that the air-conditioning could be turned off. They returned to work.

Patty Kouns further testified that on June 14, the day of the discharge, she saw Griffith get Ramona Martin off the line and a few minutes later, Ramona Martin ran into the work area and hollered something that she could not understand. About 20 minutes later, she saw group leader Griffith call Toby Kouns off the floor and Kouns never returned. At about 3 p.m., after lunch, Supervisor Wenson told her that she was wanted in the human resources office by Steve Wennerholt. She entered the office accompanied by Wenson. Wennerholt told her that Respondent was having "a little problem" and that "you four" have been timed at doing two hams per minute. He did not describe who the "four" were (Tr. 1001) and told Patty Kouns that she had "a bad attitude toward the Company." She told him that whoever told him that she bagged two hams per minute was a liar. Wennerholt said that he himself had timed her and she told him that he was a "liar" (Tr. 1001). She told him that he knew that they had had a "problem down there yesterday . . . it was cold . . . our fingers were numb" (Tr. 1001). Wennerholt said that it wasn't merely yesterday (June 13) but that she had been timed on Wednesday, June 12 as well (Tr. 1001). She then repeated that whoever told him that her work had slowed down was a liar. He told her that John Wenson had told him. Wenson was standing beside her at the time (Tr. 1002). Patty Kouns did not inquire of Wennerholt what he meant when he said that she had a bad attitude. She asked him if she was being fired and he said that she was terminated. Kouns then said: "Steve, you know the reason I am being fired is not because of my work" (Tr. 1003). Wennerholt then shrugged his shoulders. He had her check waiting for her. She then cleaned out her locker and left.

The testimony of Toby Kouns, Patty Kouns, and Ramona Martin each specifically contains a denial that any of them was ever warned or "counseled" concerning the quality or quantity of their work by any supervisor or group leader.

Respondent's defenses to the alleged unlawful discharges of Martin, Patty Kouns, and Toby Kouns

(1) *Chris Stone* testified that he was first employed by Respondent on June 10, 1991. He worked on the curing line along with Ramona Martin, Sharon McGinnis, Patty Kouns, and Toby Kouns. In the first week of employment (the three alleged discriminatees were thus discharged, on the fifth day of Stone's employment), he loaded the Koch machine and "hung" hams already bagged. Of the nine baggers on the line, he testified that he observed that Martin, McGinnis, and the two Kouns were poor employees because they were often giggling and talking with each other and not bagging hams; and when Bill Griffith walked by, they started to bag hams. In particular, he observed that, from time-to-time, Ramona Martin was talking and giggling on the line and not bagging hams, letting hams go by on the line. Patty Kouns was also talking and looking around sometimes bagging hams while talking. Toby Kouns, he thought, was a poor performer but did better at times. He said he saw Bill Griffith speak to the four ladies but could not hear them and that after he spoke to them the unbagged hams decreased. In the 4 days prior to their discharge, he testified that he saw Griffith speak to them six to seven times, more than once a day.

Stone testified that while these employees were giggling, talking and letting the hams go by, there was only one group leader at that time, Chris Hale. He said that she was back

and forth on the line but he was not sure if she ever saw them giggling and talking. He wasn't paying attention to Chris Hale. He admitted that he could not see the baggers at the other end of the line and said it was possible that other employees further up on the line could have been responsible for unbagged hams coming down the line (Tr. 1209). I credit Stone's testimony insofar as he observed, from time-to-time, these four employees kept together, giggling and talking among themselves and occasionally letting hams go by. On the basis of his testimony, I am unable to conclude that they were solely responsible for the quantity of hams that went by unbagged especially in view of his testimony that it might have been baggers further up the line who were responsible and that the seriousness of the misconduct of the three alleged discriminatees was apparently not so great as to catch the eye of the group leader Chris Hale, who, according to Stone, was consistently patrolling the line. As to whether the employees' production increased after Griffith spoke to them on the alleged six to seven occasions, that matter will be dealt with below.

(2) *Tim Dinkens*, hired in April 1991, worked on the curing line in June along with Ramona Martin, Toby Kouns, and Patty Kouns. He worked 3 to 6 feet from the three of them and said that all three of them most of the time had the bagging nets on their hands and were talking to each other, not bagging hams. Observing them many times in a day, he, like Stone, saw that they were doing nothing: just standing there with nets on their hands. He testified that the four to six baggers other than these three did much better work.

Unlike the testimony of Chris Stone, Dinkens testified that group leader Griffith spent 50 percent of his time at the line next to Dinkens and apparently had the three employees (Kouns, Martin, and Kouns) under observation but neither said nor did anything about their work habits. He also testified that of the 50 percent of his own workday spent bagging he never saw them bag any hams whatsoever (Tr. 1229). He testified that the group leader, Bill Griffith, (allegedly spending 50 percent of his time standing next to Dinkens) spent more of his time at his desk doing paper work and came over to the line to bag hams only when they were very busy (Tr. 1230). He further testified that half the time he was on the line bagging hams, Griffith was there with him bagging hams. Finally, Dinkens testified, again, that half of his workday was spent bagging: that during half of that time, group leader Griffith was standing on the line bagging hams; and that his testimony was that at all times on the line, the three alleged discriminatees kept talking and did no bagging whenever he saw them, even when group leader Griffith was on the line, standing next to him bagging (Tr. 1239). Griffith was either standing next to him bagging while the three women did no bagging (and Dinkens was 3 to 6 feet from him) or Griffith was standing at the head of the line some 6 or 8 feet from where the three women were working (Tr. 1240). Ultimately, he testified that in the month that the three alleged discriminatees were employed, Griffith was on the line with him on many occasions while the three were working and he might have seen them doing nothing. On the other hand, he said that although there are a lot of hams going by on the line, he might not have seen them because he was busy (Tr. 1242). Neither employee Dinkens nor employee Stone mentioned to group leader Griffith the fact that

these three women were not doing their share of the work (Tr. 1242).

From the testimony of employee Dinkens, I conclude that group leader Griffith had the alleged discriminatees under observation on many occasions; that assuming that they were doing nothing from time-to-time except giggling and talking to each other, he did nothing about it though the condition was known to him for about a month, according to Dinkens' testimony.

(3) Employee *Brenda Blake* testified that she worked as a bagger on the curing line with Toby Kouns, Ramona Martin, and Patty Kouns. Brenda Blake's husband, at the time she gave testimony, was a supervisor employed by Respondent. It was Brenda Blake who left the bench table while the alleged discriminatees, on June 12, were circulating for signatures the employee petition. She joined the supervisors at their table.

Brenda Blake testified that in the 1- to 2-week period prior to the discharge of the alleged discriminatees on June 14, she worked beside them, no more than 2 to 4 feet from them and observed their work. She regarded them as poor performers, continually slowing down and talking, particularly in the absence of Supervisor John Wenson. She testified that the other five baggers on the line were up to standard and were bagging eight hams per minute. She observed group leader Griffith in this 2-week period, speak to Patty Kouns and Sharon McGinnis but not Toby Kouns. When Griffith spoke to them, their poor work picked up.

Around the first of June, in a meeting devoted to the employees' gain sharing pay plan, she recalled that Supervisor Wenson told the employees, without mentioning names, that production must be maintained whether he's in or out of the room.<sup>10</sup> The events of June 7 and thereafter, of course, had not yet occurred.

Blake testified that before the discharge of the three discriminatees, she told Supervisor John Wenson that she wanted to be transferred off the curing line because she had to do the work of others including Sharon McGinnis, Toby Kouns, Ramona Martin, and Patty Kouns. Brenda Blake, who was first employed on May 14, 1991, said that this occurred in the third week of her employment around June 1. Wenson, according to Blake, told her that he'd take care of the problem for her. She was never transferred as she requested.

Unlike the testimony of the three discriminatees, Blake testified that there was no severe air-conditioning problem on the line in June and nothing was out of the ordinary.

Blake, who was admittedly antiunion, attended the "cookies and milk" meeting with Plant Administrator Messick (about 2 weeks after she was hired) along with Patty Kouns. When Patty Kouns raised the question of the presence of the Union and whether the Respondent would pay employees \$7 an hour, Messick said it was only a rumor. He said that with regard to Patty Kouns' question of whether joining the union would cause a loss of a job, Messick said that there was job security for union supporters and it didn't matter whether the employees joined the union or not.

<sup>10</sup>Such testimony confirms the testimony of Dinkens and Stone that the group leaders, and now, Supervisor Wenson, were aware of a problem on the production line concerning employees not maintaining production while Wenson was out of the room.

Brenda Blake further testified that in the week ending with the discharge of the three employees (June 14), she saw Supervisors Bolio, Johnson, and Wennerholt on the mezzanine observing the curing line on three occasions: Wednesday, Thursday, and Friday (June 12, 13, and 14) where they stood for about 15–20 minutes. She had never seen company officials on the mezzanine before that time.

Blake testified that until Griffith approached the employees, they were only bagging two to three bags per minute but after he spoke to them, their production rate went up to seven to eight bags per minute.<sup>11</sup>

Blake then testified that she saw Griffith approach and speak to them on more than one occasion but she was unable to say how many times he talked to them (Tr. 1290–1291). She then appeared to testify that she saw him speak to them once a day and then testified that he spoke to them only on one occasion (in which she did not hear the conversation) and that was the only time that he spoke to them in her presence. She testified that this occurred in the first week of June and that was the only time that she could recall that Griffith approached the three of them (Tr. 1292–1293).

(4) *Amy Gee*, employed by Respondent for about 18 months at the time of her testimony, testified that she worked on the converting line in May and June; that she knew the two Kouns and Martin because they had been sent over to help the employees on the converting line on three or four occasions (actually it was two occasions).

She regarded the two Kouns and Ramona Martin to be poor performers letting the hams go by without working on them. Gee testified that only Sharon McGinnis, Patty Kouns, Toby Kouns and Ramona Martin were sent over to help out. Testimony of other witnesses, however, shows that these four were sent over in the company of several other employees. In any event, they were sent over to do stuffing and tying of hams. In particular, she testified that Toby Kouns let the hams go by without tying them (Tr. 1301). Her previous testimony, however, was that she couldn't see what they were doing on the line and whether they were "putting forth what they could have" (Tr. 1300). Although Gee claimed to have misunderstood the question in first denying her ability to observe the job performance of the four employees (Tr. 1300), she thereafter testified that she could see only the job performance of Toby Kouns which she said was poor. It is therefore difficult to understand how she came to the conclusion that all of them performed poorly. Nevertheless, together with other employees on the line, she discussed their performance with group leader Brenda Hammons and said that because of their poor work performance the employers did not want them to return to work (Tr. 1303). Notwithstanding that Brenda Hammons, the group leader, told the employees that she would speak to the converting line coordinator, Fred Fischer, about the poor quality of their work, and while Gee did not know whether Fischer had been contacted by Brenda Hammons, the four employees nevertheless

<sup>11</sup>Just how she discovered these rates is hardly clear on the basis of her testimony or the testimony of other Respondent witnesses. She testified, for instance, that Wenson did not tell her the bagging rates of the other employees but she heard it from the employees themselves. She also testified that she didn't recall what Griffith said to the employees but counsel for Respondent objected that that is not what she said but that she testified that she didn't hear what he said to them.

returned thereafter on at least 2 occasions to work on the converting line (Tr. 1305-1306). Lastly, employee Gee testified that the employees who complained of the quality of the work of the four employees, including herself, Brenda Hammons, Elaine Dickerson, and Pam Walker, were all outspokenly antiunion (Tr. 1322-1323).

(5) *Brenda Hammons* testified that she was the group leader on the converting line; that Toby Kouns, Ramona Martin and Patty Kouns were sent over to work on her line 5 to 10 times in a month (this is clearly exaggerated); that they worked on the converting line from 1 hour to all day; that she actively patrolled the converting line and observed the employees at work, clipping and tying (Patty Kouns was doing casing and loading work); that in her opinion the job performed by the three employees were very poor; that the job performance of Toby Kouns upset her "severely" because she let hams go by; that Hammons told her to reach out and grab the hams but in response, Toby Kouns told her that other employees tied faster and that she herself did not need to do it.<sup>12</sup>

Hammons testified that she spoke to Fred Fischer after she had spoken to Toby Kouns two to three times and Toby Kouns merely shrugged at her. She told Fischer that "those girls that John Wenson sent over here aren't worth a shit" and Fischer told her to speak directly to Wenson. She did so. He told her that he had complaints from others and would check into it. When she told him not to send them again, he said that he knew about the condition and would like to get rid of them himself. Hammons places this conversation with Wenson about 2 weeks before they were discharged. None of the employees were thereafter sent over to her line.

In particular, with regard to *Ramona Martin*, she testified that Martin's fingernails cut into casing and although she eventually clipped her nails, she was not doing one out of four hams that were presented for her work. The tiers on the line complained that bags were not being clipped by Ramona Martin before they were tied. A net was supposed to be placed over the ham before it was clipped so it could be hung on a "tree." Of the 15 to 20 employees on the line, Hammons said that the 3 employees were the poorest and that she told *Patty Kouns* once or twice to speed up in moving the casings. Hammons testified that after she spoke to employees, she ordinarily saw improvement but with these three employees, there was no improvement.

Lastly, Hammons testified that although there was no "vote no" committee against the Union, she was actively antiunion and that, at a union meeting, she told the Union to "get out of town," that she had a job and needed no aggravation from the Union. She also testified that she knew that Patty Kouns, Toby Kouns and Ramona Martin were active union supporters. She nevertheless testified that on her converting line, there were some good prounion employees and some bad antiunion employees.

<sup>12</sup> Supervisor Wenson testified that he sent the four employees over to the converting line fewer than five times; that on each occasions, he sent five to seven employees; that these employees were sent over to the curing line 2 weeks before June 7 which is the first time that Wenson looked into the problem after Brenda Hammons complained to him; and Brenda Hammons testified that these employees did not work for her on her line in the month of June.

Ramona Martin testified that on two occasions in the week ending June 7 (Friday) when a half dozen or more employees were sent over to the converting line to work under Brenda Hammons, Brenda Hammons, according to Ramona Martin, told her that she thought she was a good worker and indeed was the best of all of them that had been sent over. Martin testified that Hammons told her that if she thought she could "handle" working under Hammons on the converting line, she would speak to John Wenson and see if she could be transferred. Brenda Hammons specifically denied Martin's testimony that she offered Martin the opportunity to work on her line. Rather, she testified that she told Martin, sarcastically, that she could get work out of Martin (who was able to do the job) if Martin was working under Hammons. In rebuttal, General Counsel again called Ramona Martin who testified that in a conversation in the cafeteria one week before the June 14 discharge, Hammons asked her to consider transferring to Hammons' line and offered to talk to Wenson about it, asserting that Martin was one of the best sent over. Martin said that she made no reply.

(6) *John Wenson*, employed 8 years by Respondent and since August 1990, a coordinator on the curing line, unaccountably testified that he first became aware of "problems" with Ramona Martin, Patty Kouns and Toby Kouns who worked on his line on Friday, June 7, 1991.<sup>13</sup> It is therefore difficult to square the timing of when Supervisor Wenson first became aware of the work problems concerning these three employees. Whereas Hammons testified that she spoke to Wenson more than 2 weeks before the discharges (Tr. 1344), and therefore in May 1991; Wenson testified that he first became aware of a problem concerning their work habits on Friday, June 7, 1991, when his group leader Billy Griffith told him that he had a problem with those three employees not doing proper bagging (Tr. 1430-1431). Yet, as noted hereafter, group leader Griffith testified that the three employees performed poorly commencing with their 3-week training period and thereafter. Whenever he observed their work, they were performing poorly (Tr. 1567-1570). They were performing so poorly, he testified, that he three times stopped production apparently because of them. But he never reported these interruptions.

Supervisor Wenson testified that his group leader, Bill Griffith (the other group leader on the line was Christine Hale), told him that he had a problem with the two Kouns, Sharon McGinnis, and Ramona Martin in that they were not bagging. He told Griffith that he would check it out. He then went up to the mezzanine surrounding the work floor, about 20 feet above the work floor, and observed the employees on the bagging line. He testified that he saw the four employees (including Sharon McGinnis) not doing their job and

<sup>13</sup> As above noted, group leader Brenda Hammons testified that she spoke directly to Wenson concerning the poor quality of the work of these employees on her line as early as the beginning of the last week of May, 1991. It was in that conversation that Hammons said that the girls weren't worth anything and that Wenson, according to Hammons, said he would check into the situation and that he had complaints before hers about them (Tr. 1343-1344). Wenson ended that conversation by saying: "I know . . . I'd like to get rid of them myself" (Tr. 1344). Again, the Hammons' conversations with Fred Fischer and Wenson occurred on the same day and occurred more than 2 weeks before the June 14 discharges (Tr. 1344).

that the balance of the eight baggers were working a lot harder because the four employees were not doing their work. He testified that he then left the mezzanine, proceeded downstairs and directed group leader Griffith to counsel the four employees. Wenson did not speak to any of them nor did he accompany Griffith nor, does the record show, did he receive a report on the result of the counseling. Wenson observed that on June 7, as a result of these employees' lack of attention to their work, there were a thousand unbagged hams in the vats at the end of the line whereas usually only about 100 to 200 are unbagged. Wenson particularly testified that at the same time he told Griffith to counsel the employees, he told Christine Hale to do the same thing: "Tell them they need to be doing their job" (Tr. 1496; 1498). Christine Hale, according to Wenson, had not complained to him concerning their work habits.

On Monday, before 10 a.m., Wenson noticed that there were perhaps 900 unbagged hams in the vats. He then sought out Processing Manager Dave Bolio and told him of his problem with employees not doing their job. They went together to the mezzanine and saw the four subject employees talking and not doing their jobs while other employees were doing their jobs. Wenson testified that Bolio directed him to have his group leaders talk to the four employees. When Bolio told Wenson to have his group leaders talk to the four individuals, Wenson did not tell Bolio that he had already done so (Tr. 1439). Rather, he again instructed Griffith (he does not mention Chris Hale) to counsel the employees (Tr. 1439). Although he did not hear what Griffith said to the employees, "everything went fine after Billy talked to them" (Tr. 1440).

Although nothing of consequence happened on June 11 (Tuesday), by June 12, the same problem, according to Wenson, reoccurred (Tr. 1440). There were about 1000 hams at the end of the line unbagged.<sup>14</sup> He noticed this after lunch and again sought out Bolio who in turn sought out his superior, Plant Manager Les Johnson. They then created a plan. Bolio and Johnson went up to the mezzanine and, according to the plan, Wenson returned to his downstairs work station in order to show Johnson and Bolio how the line operated when he was in the room (Tr. 1441). According to the plan, Bolio then called down to Wenson to come up to the mezzanine to see what happened to the employees on the bagging line. Thus Wenson left his desk near the curing line (60 feet from where the four employees were working) and proceeded up to the mezzanine.

After Bolio and Johnson called Wenson to return to the mezzanine, Johnson yelled out: "they're only bagging two a minute" (Tr. 1446). Johnson mentioned only Toby Kouns and Sharon McGinnis (Tr. 1447-1448). Wenson apparently testified that Johnson yelled it twice: once when Wenson was

up on the mezzanine and again when Wenson had returned to the floor (Tr. 1448-1449). Whether the employees heard what Johnson yelled was not established. After Johnson yelled down, production allegedly went well (Tr. 1451).

Wenson testified that on the next day, Thursday, June 13, the same production problem arose again. Again, Wenson sought out Bolio who this time went to see Steve Wennerholt, the human resources director (Tr. 1452). Bolio and Wennerholt then performed the same function as Bolio and Johnson had done the day before: they went to the mezzanine to observe the employees while Wenson went to the work floor. Bolio then again called down to Wenson to come up to the mezzanine (Tr. 453). Wenson testified that as soon as he got to the mezzanine, Wennerholt was "irate" and said: "who are these people . . . this is bull shit." (Tr. 1453). Wenson and Bolio gave him the names of the four employees at Wennerholt's request (Tr. 1456). Wenson testified that the four employees were easily identifiable as not doing work: They would each "half bag" a ham and stand there and hold it and start talking amongst themselves (Tr. 1457). Whenever someone in authority entered the room, they finished bagging the ham (Tr. 1457). He testified that they failed to perform the work even though group leader Griffith was patrolling the line. This also occurred even after Griffith had at least twice counseled the employees concerning their poor work. Wenson testified that the reason he sought out Bolio and Johnson was that he was going through the channels of the chain of command and wanted to get higher authority involved before he recommended that they be fired (Tr. 1459). He testified that although Griffith counseled these employees on more than one occasion, urging them to work harder, it brought no response from these four employees (Tr. 1459-1460).<sup>15</sup>

At 4 p.m., Wenson, Bolio, Johnson and Wennerholt held a meeting. The purpose of the meeting was to decide what to do about these four employees who slowed production when the coordinators were not around. The supervisors voted unanimously to recommend that they be terminated for failure to do their jobs. Later in the day, Wenson told Plant Administrator Tim Messick of the recommendation and Messick said that he would look into the matter.

Tim Messick testified that he alone has the power to authorize the termination of employees; that in the afternoon of the 13th of June, he met Wennerholt in the hall and found him highly agitated. Wennerholt told him that he wanted to terminate "those people." Messick told Wennerholt to calm down and to supply the details. Between 5 and 6 p.m., Messick held a meeting with Bolio, Les Johnson and Wennerholt. In the meeting, they told him they investigated the matter and their unanimous recommendation was for discharge. They told him of several incidents wherein they themselves had seen the employees slow to a stop and Messick told him that he would think about it. On the next morning, he told them that he agreed with their decision and authorized them to proceed to terminate the employees.

(7) *Group leader Bill Griffith* testified that he was the group leader on the bagging line until June 12 when he was

<sup>14</sup> Wenson did not deny General Counsel's witnesses' testimony that the line had speeded up that week. The 900 to 1000 hams which accumulated in the vats occurred, apparently, because Wenson speculates that he may have been on duty away from the curing line for as much as 2 hours (Tr. 1444). He also testified that even patrolling the line, he might not have noticed the vats at the end of the line accumulating 1000 hams and that group leader Griffith, whose responsibility is also to patrol the line, may also have been in a different room and not seen it. He acknowledged, however, that it was Griffith's responsibility to see that the hams did not accumulate in the vats (Tr. 1444).

<sup>15</sup> The record, therefore, does not encourage a favorable credibility evaluation for Wenson. He testified a few minutes earlier that "everything went fine after [Griffith] talked to them" (Tr. 1440). Here, Griffith's counseling brought no response (Tr. 1459-1460).

promoted to be the coordinator on the line, replacing Wenson. As the prior group leader on the curing line, he had an opportunity to witness the production of Toby Kouns, Ramona Martin, and Patty Kouns. He described their performance as "very poor" (Tr. 1557). In particular, he testified that their performance was "very poor" the whole time they were employed by Respondent and whatever job they did whether 90 percent of the time in bagging or 10 percent of the time in some other job (Tr. 1566-1567). Thus, he testified that he observed that they were poor employees even during the 3-week training period following hiring (Tr. 1567) and they were poor in every job they did (Tr. 1568). Griffith, however, testified both that they were capable of doing good work and did so possibly around 50 percent of the time (Tr. 1568), and that at *no time* did he observe them ever perform well (Tr. 1570).<sup>16</sup> He then testified that perhaps they worked 3 or 4 hours in the morning on a good basis and regularly failed to perform thereafter (Tr. 1571).

Griffith testified that on several occasions he spoke to them about their performance. The first was on June 5, 1991. He saw them letting hams go by unbagged whenever coordinator Wenson left the room. Although he saw them perform in this fashion before June 5, he testified that he never spoke to them about their poor performance. On June 5, he asked them what their problem was and admonished them to keep up production. He said they never answered him. They were together on the line across from each other. He said, however, that their production improved after he spoke to them.

On the next day, June 6, he saw that when Supervisor Wenson left the area, the slowdown began again with the employees not bagging. The employees complained that it was wet and cold and he told them he would order "socks" to be put over the air-conditioning vents. After that, he testified that production improved.

On the very next day, Friday, June 7, when Supervisor Wenson left the area, the three of them stopped bagging entirely. Griffith testified that he told Wenson about the failure to bag and named the three employees. Griffith, corroborating Wenson, testified that Wenson directed him to talk to the employees and he did so. There was no mention in *Griffith's* testimony that at this time, or at any other time, Wenson had instructed group leader Chris Hale, in Griffith's presence, to admonish the employees to work harder. Wenson told Griffith that while Griffith was admonishing the employees, Wenson would observe what was going on. Griffith said that Wenson then went to the mezzanine and, on returning, told Griffith to speak to the employees again. He did so and told the employees to continue to engage in the bagging operation even when Wenson left the room. He testified the employees again did not answer him.

The fourth time that Griffith said he warned the employees was on Monday, June 10. Again, when Wenson left the area, the work slowed down. He said he then discussed this matter with Wenson who asked him what was going on. Griffith told him it was the same three employees who were slowing down production and Wenson told him to talk to the employees again. He did so. He observed Wenson was becoming

upset at the fact that the employees continued to slow down. Griffith said he then admonished the employees and received no response but noted that production had gone up. Griffith testified that Tuesday, June 11, showed normal production.

On June 12, when Griffith was promoted to coordinator over the bagging operation, he heard, about noon, shouting coming from the mezzanine and saw Les Johnson up there shouting that the employees were bagging only two hams per minute. He noticed that all the employees looked up at the shout.

Whereas on June 13, Griffith was not involved with the three allegedly bad employees, he knew that on June 14 they were terminated. Indeed, he was a witness at the Patty Kouns' termination. He denied that she accused anyone of being a liar and said that Kouns said she would avoid the group of employees if given a second chance.

As previously noted in the margin, the cross-examination of group leader Bill Griffith was favorable neither to his credibility nor to Respondent's defense. He testified that on June 5, with the three employees not bagging the hams and letting others go by, the accumulation of hams was so great that he shut down the production line on hams (but not the bagging line which accepts the produced hams) for 5 minutes in order to let the employees catch up with the bagging so that they could start the ham production line again (Tr. 1598-1600). On June 6, according to Griffith, the same thing happened when Wenson left. The employees stopped bagging and he again stopped the Koch injection machines producing the hams. He kept the bagging line conveyor belt running so that the existing unbagged hams could be bagged. He testified that he had no such problems with other employees and had *never shut down* the production machines with other employees (Tr. 1605). Griffith testified that his shutting the production line down was a "serious matter" but he did not report either of these two shutdowns to anyone. Finally, Griffith testified that even before Supervisor Wenson left the bagging line area, hams were backed up and that he could not be sure that it was not *other* employees who may have caused the problem with the backup (Tr. 1615). He then testified that this was not a correct statement but that the three employees in question at least contributed to the problem (Tr. 1617). He then admitted that there was a problem with backed up hams even before Wenson left the room (Tr. 1617). He then testified that he "assumed" that the three employees contributed to the problem. He also testified that they were not bagging hams even before Wenson left the room (Tr. 1618). When the General Counsel called to his attention the fact that his original testimony was that the problem of the employees not working did not arise until Wenson left the room, Griffith said that he did not know what the General Counsel was driving at (Tr. 1619) but admitted that there were already an abundance of hams overflowing into the vats even before Wenson left the room (Tr. 1619). He lastly testified that on June 7, he actually did not know what caused the problem with the backed up hams (Tr. 1619-1620). He testified, however, that he shut the production line down as soon as Wenson left the room (Tr. 1620). Ultimately, he testified that although they were not fully doing their jobs even when Wenson was present, as soon as he left the room, they stopped work completely (Tr. 1620-1621). Thus, Griffith testified that he counseled the employees three times (June 5, 6, and 7); that he spoke to Wenson on June

<sup>16</sup> As with coordinator Wenson's testimony on the question of when he first became aware of problems with the three employees, Griffith's testimony here on the *quality* of their work does not allow a conclusion in favor of his credibility.



7; and that he shut down the production line a total of three times; on June 5 (Tr. 1600–1601); on June 6 (Tr. 1603–1604); and on June 7 (Tr. 1609). But contrary to the testimony of Johnson, Bolio and Wenson, Griffith admitted that there were production problems on the line with the backing up of hams even before Wenson left the room (Tr. 1617); and that Griffith merely assumed that the three recalcitrant employees were causing the problem (Tr. 1618). He also testified that other employees who were not bagging might have caused the problem of backed up hams before Wenson left the room (Tr. 1627). And that he had closed the line down for as much as 20 minutes and then spoke to the employees on June 7.

With regard to his fellow group leader, Christine Hale, Griffith testified that Hale was on the line with him on June 5, 6, and 7. His testimony in this regard was that she saw what was going on on the line and she heard Griffith talk to the employees (Tr. 1635). He then testified (a) that Hale talked to the employees; (b) that Hale did no talking to the employees; (c) that Griffith did the talking to the employees; (d) that Hale and Griffith both did the talking to the employees with Hale standing immediately next to Griffith; and finally (e) that Hale told the employees that they had to keep the production up (Tr. 1636).

(8) Processing Manager *David Bolio* testified that he did not become involved in the discharge of the employees until June 10 when Wenson told him of production difficulties because of a slowdown with the four employees. Corroborating Wenson's testimony, Bolio went to the mezzanine and observed the curing line seeing the three employees were not working. They were holding the bags and not actually bagging hams. He told Wenson that this was unacceptable and to have the group leader counsel them. Wenson and Bolio then left the mezzanine.

The second time he became involved was on Wednesday, June 12, when Wenson again complained of the same problem. Bolio then called his superior, Les Johnson. Johnson and Bolio went to the mezzanine with Wenson. With Johnson timing the operation, Bolio told Wenson to go to the production floor. He said the would check production both when Wenson was on the line and when he left. They checked production and when Wenson was on the line, production was good; when he left the line, the employees were talking amongst themselves, permitting the hams to go by unbagged. Wenson then returned to the mezzanine and together with Bolio they then proceeded to the work floor. While they were on the work floor, Johnson yelled at them: "Hey, they're only bagging 2 a minute." He observed the employees look up at that time.

Bolio testified that the next day, Thursday, June 13, Wenson came to him with the same problem again. This time Bolio called Wennerholt and they both went to the mezzanine to observe the employees. They directed Wenson to go to his desk and then motioned for him to come up to the mezzanine. He did so. Wennerholt asked who the employees were and noted that it was "bull shit" that the employees failed to work whenever Wenson left his desk. Wenson then left to involve Plant Administrator Tim Messick. Wennerholt told Messick that he was not going to believe it; that he wanted the employees fired. The Supervisors (Johnson, Wenson, Wennerholt, and Bolio) then held a meeting in Wennerholt's office that afternoon (Thursday, June 13) and

unanimously concluded that the four should be terminated and so told Messick later in the evening. According to Bolio, contradicting Messick's testimony, when they went to Messick later in the evening to recommend terminating the four employees, Messick did not ask for details or ask time to investigate. He already knew the details.

(9) *Stephen Wennerholt*, director of human resources, testified that he first became involved in the matter on Thursday, June 13, the day before the discharges. That morning Bolio told him that he had a problem with employees on the floor who would not work if the coordinator was not present in their presence. Wennerholt and Bolio went to the mezzanine, watched the curing line while Wenson was present. Bolio then called Wenson off the floor to come to the mezzanine. Wenson came to the mezzanine and Wennerholt said that he saw the four front employees on the line literally stop working; laughing and joking. When Wenson returned to the mezzanine, Wennerholt asked who the four employees were and he told him. Wennerholt said he remarked to Bolio that it was unbelievable; that Respondent could not have this and that the employees should be fired. Wennerholt then left the mezzanine and sought out Plant Administrator Messick. He told Messick what was happening; that he was upset and that they should be fired. Unlike Bolio, Wennerholt testified that Messick told him to "hold on," to investigate, and get the facts straight. Wennerholt said he then spoke to Griffith, Wenson, Bolio, Johnson and group leader Chris Hale in order to evaluate the four individuals and to gain her opinion (Tr. 1746). Chris Hale told him that all three were capable; that Ramona Martin just did not do the work at times; that Toby Kouns was normally "pretty good" (Tr. 1765) and that Patty Kouns was getting good, was capable most of the time (Tr. 1762), and did not "slip" [in production] in the absence of supervision (Tr. 1766–1767).

In the meeting on June 13, wherein Wennerholt was present with Bolio, Johnson, and Wenson, there was the unanimous recommendation that they be discharged. Later, Wennerholt met with Messick; told him that they had investigated; that all four employees were capable; that they had been previously warned and were not performing. Messick told Wennerholt that he wanted to think about it, but on Friday morning, told Wennerholt he should fire them.

(10) In rebuttal, group leader *Christine Hale* testified that David Bolio never directed her to counsel the employees; that Wenson never directed her to counsel the employees; and that she was not present with group leader Bill Griffith when Wenson allegedly told them to counsel the employees. Hale was an admitted prominent union supporter who engaged in handbilling. I nevertheless credit her testimony relating to her overhearing Wenson's antiunion "bitch fit" statement against Patty Kouns, Ramona Martin, and Toby Kouns particularly because (a) neither Wenson nor Griffith ever denied it and because (b) it was clearly confirmed and corroborated by the credible testimony of witness Betty Jo McHenry. I further credit her testimony, contrary to Wenson and Bolio's testimony, that she was never directed to counsel employees by Wenson or Bolio; nor was she present with Griffith when Wenson allegedly told her to counsel the three employees. I necessarily discredit Wenson's testimony that, on June 7, when Griffith told him before lunch that he was "having a problem" with the production employees, he told

both Griffith and Hale, at the same time, at his desk, to counsel the employees.

(11) Plant Superintendent *Les Johnson* testified that he was involved in the terminations of the two Kouns and Ramona Martin.

Johnson testified that on June 12 Wenson told him that there were a few employees who stopped work *when he left the room*. Johnson told Wenson that he would observe them from the mezzanine. In the company of Bolio, and having directed Wenson to remain on the floor, Johnson says he observed that the curing line ran like a "machine." When Wenson left the area, however, and joined Bolio and Johnson on the mezzanine, Johnson testified that he saw the four individuals "almost stop working." He then timed them on their bagging of hams. He testified that he saw them looking around the room, trying to observe whether Wenson was going to return. At that point he yelled down to Wenson that the four employees were only bagging two to four hams per minute. He testified that he timed them each for 2 minutes for a total of about 10 minutes.

On the next day, Thursday, June 13, Johnson testified he was paged by Wennerholt. He told Wennerholt he had observed the same thing the day before. He discussed their options and at the afternoon meeting (Bolio, Johnson, Wennerholt, and Wenson) decided on termination. They recommended it to Messick and Johnson was not further involved in the terminations.

#### June 14; the terminations of Ramona Martin, Toby Kouns, and Patty Kouns

Director of Human Resources Wennerholt testified that on Friday morning, June 14, Messick gave him his decision authorizing the termination of the employees. Wennerholt, as the director of human relations, was the Respondent's principal involved in the discharges.

Ramona Martin was called in on the morning of June 14. Wennerholt told her that he was discharging her for failing to perform her job. Martin responded by saying: "this is bull shit . . . you're firing me because I am for the Union" (Tr. 1750). Wennerholt denied this saying that Respondent does not fire employees because they support the union and in fact they had recently promoted employees who had supported the union; that it was the work of the employees that made the difference. Wennerholt did not mention the names of the prounion employees who had been just promoted (Tr. 1750). Wennerholt testified that Martin's response to his statement was a mumbled answer that he did not really know what she said. He did recall that Martin asked for the MSDS sheets for the curing mix and Wennerholt told her that he would provide them to her.

Ramona Martin testified that about 1 to 1:30 p.m. after lunch, Griffith told her that she was wanted in the human resources office where Wennerholt told her that Respondent was going to have to discharge her immediately because she had slowed down production to 2 to 2-1/2 hams per minute. Martin told him that this was untrue and asked who had told him about the slowdown. Martin said that Wennerholt would not say who had told him but she asked that they be brought up there to confront her. Wennerholt told her that the coordinators had timed her and that they had even timed her on

another line the week before<sup>17</sup> but she did not work out either on the converting line or on her regular bagging line. She testified that he gave her the wrong MSDS sheets but told her that if he got the right ones he would mail them to her. When he told her that she did not work out on the other line either, Martin asked him if he meant Brenda Hammons' line but Wennerholt did not answer. She asked him to get Brenda Hammons because Hammons told her that she'd like her to transfer over to her line. Wennerholt then told her to leave the building. Martin's testimony was that she told Wennerholt that he knew that she was not being discharged because of her work. Wennerholt, as above noted, recalled that she said she was being fired because of the Union.

#### The discharge of Toby Kouns

Although Wennerholt testified that the next individual with whom he had had a termination interview was Patty Kouns (Tr. 1752), he appears that he was mistaken; and that it was actually Toby Kouns (Tr. 998). Patty Kouns testified that about 20 minutes after group leader Griffith took Ramona Martin off the line, after lunch, he came for Toby Kouns about 20 minutes later (Tr. 997-998).

In response to Toby Kouns' testimony, above, Wennerholt testified that he terminated Toby Kouns because of her failure to perform her job. Toby Kouns responded, according to Wennerholt, with the same epithet as Martin's: that "it was bull shit and it was because she was for the union." (Tr. 1754.) Wennerholt testified that he responded by saying that Respondent did not fire people for supporting the union and Toby Kouns' response was only to ask "for a second chance" (Tr. 1754). Wennerholt told her he would not offer her a second chance. Wennerholt testified that he could not recall Toby Kouns answering his response.

#### The discharge of Patty Kouns

Bill Griffith took Patty Kouns off the production line after he had taken Toby Kouns (Tr. 998-999). Patty Kouns worked until about 3 o'clock, and started to go to the breakroom for the afternoon break. John Wenson motioned to her with his finger while she was on the steps going to the breakroom (Tr. 999). He told her that she was wanted in the office and she proceeded to the Wennerholt office (Tr. 1000). Whereas Patty Kouns incorrectly testified she was alone in the office with Wennerholt during her discharge interview (Tr. 1000), Wennerholt testified that it was either John Wenson or Bill Griffith in the office during the interview with Patty Kouns (Tr. 1752). Griffith testified that he was in the office during the termination interview with Patty Kouns. I credit Griffith.

Wennerholt testified that he told Patty Kouns that she was being discharged for failure to perform her job; that Patty Kouns responded that she was very sorry; that she would like a second chance; and if given a second chance, "would stay away from those people" (Tr. 1753). Wennerholt testified that he did not inquire who "those people" were. Indeed, Wennerholt testified that he told her that her discharge had

<sup>17</sup>There is no other evidence to support any such timing of the employees' production on the converting line. Neither coordinator Fred Fischer nor group leader Hammons (who had an extremely low opinion of the three curing line employees) ever mentioned it. I regard Wennerholt's testimony as an invention.

nothing to do with anyone else; that “hanging around with people, whoever they are, had nothing to do with her discharge.” Her discharge was because she failed to perform her job. Wennerholt said that Patty Kouns merely repeated she was sorry. He did not deny her testimony that he told her that she had a “bad attitude” toward the Company. He denied that she accused him of being liar or accused anyone else of being a liar.

Corroborating Wennerholt, Griffith testified that he accompanied Patty Kouns to, and was present in the office and, after Wennerholt told her that Respondent was going to terminate her employment, Kouns asked for a reason. He told her that he had observed her production and she wasn’t doing anything. When she asked who here accuser was, Wennerholt told her that one of them was Bill Griffith who was sitting next to her. Griffith testified that Kouns said nothing, merely lowering her head during the interview. He denied her testimony that she called Wennerholt a liar or said anything else during the interview other than asking for a second chance (Tr. 1591). Wennerholt told her that he would have to speak to Messick and that she should call his office on the following Monday. Griffith also testified that Martin said that if she were given a chance, she wouldn’t hang around with same group (Tr. 1591–1592).

#### Discussion and conclusions regarding the discharges of Patty Kouns, Ramona Martin, and Toby Kouns

##### 1. John Wenson’s “bitch fit”

Respondent apparently recognized the gravity of the corroborative testimony of Betty Jo McHenry (Tr. 1149–1153). Ultimately, McHenry, without any apparent interest in the outcome of this litigation, a former Respondent employee, corroborated the testimony of group leader Christine Hale: that on May 23, 1991, while the three above-named alleged discriminatees were working on the bagging line under John Wenson’s supervision, group leader Christine Hale overheard Supervisor Wenson tell Christine Hale’s co-group leader, Bill Griffith, that he would throw a “bitch fit” concerning the girls on the line who were out handbilling (Tr. 502–505). More important, Wenson was overheard specifying the female employees against whom he was going to throw his “bitch fit”: Ramona Martin, Patty Kouns, Sharon McGinnis and Toby Kouns (Tr. 505). Within 2 hours of Christine Hale’s overhearing Wenson make these remarks, she repeated them to the four employees who were the subject of those remarks (Tr. 506). She also told other employees. Betty Jo McHenry testified that Christine Hale told her that Wenson’s “fit” would not be directed at “Melissa” and herself, both employees on the bagging line, and that these two employees should not pay any attention to Wenson’s conduct (Tr. 1149–1150) because it was not directed at the two latter employees (Tr. 1150). She told told McHenry that Wenson was “really upset” because the girls were out on the street handing out union literature (Tr. 1151–1153). As above noted, McHenry herself observed that Wenson appeared to be upset on that day, May 23, 1991 (Tr. 1152, 1147).

After strenuously resisting the receipt of the testimony of its own group leader, Christine Hale, on the substance of what she overheard Supervisor Wenson say, and further resisting corroboration by Betty Jo McHenry, Respondent, for whatever reason, failed to have Supervisor Wenson or group

leader (supervisor) Bill Griffith deny any of Hale’s or McHenry’s testimony.

Moreover, after questioning the credibility and veracity of Christine Hale by noting that her pretrial affidavit given to the Labor Board contained no reference to her having overheard Wenson nor did her affidavit given to Respondent mention such conversations, Respondent nevertheless, as above noted, failed to have either Wenson or Griffith deny Christine Hale’s testimony, especially as expanded on and corroborated by former employee Betty Jo McHenry.<sup>18</sup>

In short, there is no question that as early as May 23, 1991, Respondent singled out the three employees because of their distributing union literature and manifested considerable antagonism against such activity. Given the June 14 discharge of the three employees, group leader Christine Hale’s testimony, directly in the presence of Plant Administrator Tim Messick, alone, creates a prima facie case of unlawful discharge of the three named employees; prior knowledge of the their union activities, animus directed specifically against such activity, and specialized identification of the three of them.<sup>19</sup>

##### 2. The June 12 circulation of the union petition

I find that on June 12, 1991, Patty Kouns, Sharon McGinnis, Ramona Martin, and Toby Kouns were in the company of two other employees seated at a table in the lunchroom.<sup>20</sup>

<sup>18</sup>The first charge in the consolidated matter, filed June 17, 1991 (G.C. Exh. 1(a)), alleges the unlawful discharge on June 14 of Ramona Martin, Patty Kouns, Toby Kouns and Sharon McGinnis because they engaged in protected and union activity. In a sworn statement dated July 16, 1991 (R. Exh. 8), submitted to *Respondent*, Christine Hale swore, inter alia, that she at no time informed any of the above four employees that they “should stop distributing union authorization cards because John Wenson disapproved of the distribution of such cards.” She also swore that she made “no statement similar to the statement attributed to me and described in the preceding paragraph.” In view of Respondent’s failure to have its Supervisors Wenson and Griffith deny any of Christine Hale’s credited and corroborated testimony, it would seem to me to be questionable, perhaps coercive, to have her swear to an arguably false denial of conduct “similar” to that appearing in the prior text of her affidavit.

<sup>19</sup>I sustained General Counsel’s repeated objections to Respondent’s attempt, on cross-examination, to secure, inter alia, Christine Hale’s opinion, as group leader over the three employees, concerning the quality of their work. The subject matter of such cross-examination was clearly outside the scope of the direct examination and it seemed to me to be improvident to open that door to prove Respondent’s defense on the redirect examination of a witness whose testimony was extremely limited. In any event, Director of Human Resources Stephen Wennerholt testified at length concerning his evaluation, use and the weight given to group leader Christine Hale’s investigative report concerning the quality of the work of the three employees. I did not restrict opinion testimony from group leader Griffith and other nonsupervisory personnel called as Respondent’s witnesses.

<sup>20</sup>Although Ramona Martin testified that this event occurred 2 weeks before her June 14 discharge, I find that it occurred on June 12, 1991. In this regard, I rely on the date appearing on the face of the circulated petition (G.C. Exh. 4) which Ramona Martin said was signed by Gloria Mauro on the day of the circulation of the petition.

Seated at a nearby table, perhaps 9 or 10 feet away, staring at the employees at the table who were attempting to have Gloria Mauro and Gretta Bradford, newly hired employees, sign a petition in support of the Union, were Supervisors John Wenson, Dave Bolio, Les Johnson, and group leader (now coordinator) Bill Griffith. They sat there staring at the table while Patty Kouns and Sharon McGinnis were attempting to influence Gloria Mauro and Gretta Bradford to sign the petition in favor of the Union. Gloria Mauro did sign and date the petition. I therefore conclude that on Wednesday, June 12, 1991, 2 days before the three employees were discharged, Respondent was reminded of the union loyalty and support of the three employees and of their efforts to communicate that loyalty and support to newly hired employees. Supervisor Wenson, of course, was one of the on-lookers. Two members of the superior supervisory hierarchy were also present. All of them then participated in the meeting and voted (June 13) for the recommended discharges (the next day, June 13).

### 3. Ramona Martin and coemployees in the protected activity of demanding MSDS sheets

There is no dispute that Ramona Martin hurt her hand and arm on Tuesday, June 4 and again on Friday, June 7, 1991. While it is not entirely clear from her telephone request of 7:30 p.m. on Friday, June 7, for the composition of the materials in the curing juice, whether Respondent knew of the request, there is no question that on Monday, June 10, and on Tuesday, June 11, she asked Wenson for the MSDS sheets. There was no denial that Wenson told her that there was nothing in the curing juice except salt and water ("damn it") and that on Ramona Martin's request for the MSDS sheets, for her doctor, Wennerholt told her that he did not have them at the time.

Early in the morning of the same day (June 12) on which Ramona Martin and the other alleged discriminatees later sought to have employees Gloria Mauro and Gretta Bradford sign the petition in favor the Union at lunchtime, Ramona Martin, accompanied by Sharon McGinnis and Patty Kouns, served a written request for MSDS sheets in the human resources office. In the absence of Director Stephen Wennerholt, she gave the written request to the office clerical and told the clerical that she wanted the MSDS sheets by that evening.

Again, in the afternoon of June 12, about 1:30 p.m., she went to Wennerholt's office and asked Wennerholt himself for the sheets and Wennerholt told her that he did not have them at the time. In short, Ramona Martin credibly testified that she first asked for the MSDS sheets on Monday, June 10 and asked for them again on June 11 and 12.

On the morning of Thursday, June 13, she went to the human resources office and asked for the MSDS sheets again. Wennerholt was present at this time and Ramona Martin testified that she asked for the sheets. On Friday, June 14, she was unlawfully discharged.

### 4. Thursday, June 13; air-conditioning on the bagging line

As above noted, on the morning of Thursday, June 13, Ramona Martin asked Wennerholt, in his office, for the MSDS sheets.

At breaktime, about 3 p.m., Ramona Martin, Patty Kouns, and Sharon McGinnis had complained to coordinator Bill Griffith over the allegedly frigid nature of the temperature on the bagging line. Griffith set up an appointment for them later in the day with Processing Manager Bolio whom the employees originally demanded be sent down to the production (line to observe the actual working conditions). At 4 p.m., Toby Kouns, Patty Kouns, and Ramona Martin spoke to Bolio in the cafeteria where Griffith had set up the meeting. They told him that the covers were off the air-conditioning blowers and it was very cold; and that they had no work break that day which they had expected earlier in the day.<sup>21</sup>

### Wennerholt's remarks during the discharge interviews of June 14, 1991

I conclude on the basis of the above testimony, alone, that General Counsel has proved a prima facie case that Respondent, in violation of Section 8(a)(3) and (1) of the Act terminated the employment of Toby Kouns, Ramona Martin, and Patty Kouns. This flows from the fact that the above paragraphs (Wenson's May 23 "bitch fit" remarks) demonstrate Respondent's union animus, its identification of the three employees as being union activists; its resentment against the three of them for their particular union activities (distribution of handbills); Respondent's June 12 knowledge of these employees' continued support and participation in union activities (at the lunch table under the observation of Respondent's supervisors); and, on June 13, the day before the discharge, these same employees demanding a special meeting with a superior supervisor in order to change the air-conditioning system in Respondent's plant because of bad working conditions (too cold). The discharges the next day, Friday, June 14, I conclude, presents a prima facie case of unlawful discrimination within the meaning of Section 8(a)(3) and (1) of the Act in the discharge of the three employees.<sup>22</sup> Under

<sup>21</sup> Griffith told Patty Kouns (Tr. 1052) that there would be no work break until all the hams were bagged. Wenson apologized to bagging line employee Betty Jo McHenry over his failure to permit a break for the bagging line employees that day. He said that he "needed to prove a point to the women on the bagging line" (Tr. 1146). Wenson did not say he had to prove a point to "some" women. Ramona Martin testified that Toby Kouns was present only at the very beginning of their June 13 afternoon meeting with Dave Bolio. To that extent it explains Toby Kouns denying participation in complaints about the cold on June 13. Toby Kouns credibly testified that many employees on the line or near the line complained of the cold, including group leaders Hammons and Hale, Patty Kouns, Sharon McGinnis, and Ramona Martin. Toby Kouns' further uncontradicted and credited testimony, corroborating Betty Jo McHenry's testimony (that Wenson told McHenry that the lack of the work break was to teach the bagging employees a lesson), was that the conveyor belt was set very fast both on June 13 and 14, 1991.

<sup>22</sup> Although Ramona Martin's repeated requests irritated Respondent and may well have also contributed to Respondent's motivation in the discharges, I have not included Ramona Martin's activities to gain the MSDS sheets as part of the prima facie case which exists apart from the MSDS sheet issue. Even if Respondent had knowledge of the two employees acting as witnesses to Martin's serving a written request for the MSDS sheets on the office clerical, there is no suggestion that the witnesses (Sharon McGinnis and Patricia Kouns) in any way supported Ramona Martin's request. The most

*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), Respondent may then attempt to rebut the General Counsel's prima facie case by showing that the alleged discriminatees' protected activity played no part in its allegedly discriminatory activity or it may attempt to establish that it would have taken the same action regardless of any protected concerted activity or union activity engaged in by the alleged discriminatees. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–401 (1983); *NKC of America*, 291 NLRB 683 fn. 4 (1988).

I find, further, contrary to Wennerholt's denials (though corroborated, in part, by Bill Griffith and John Wenson) that in the discharge interviews, as follows, Wennerholt made the following remarks:

(a) Whether Wennerholt said it on one, or more than one, occasion, I credit Toby Kouns' testimony that Wennerholt told her, in the June 14 discharge interview: "We've got to watch who we're with; we've got to watch the company we keep."

To the extent Griffith was present at any of the termination interviews, he testified he was present at the termination of *Patty Kouns* rather than *Toby Kouns*. Thus group leader (then supervisor) Bill Griffith did not testify, much less contradict, Toby Kouns' testimony that he was present when Wennerholt made the above remarks.

The above remarks, innocent in themselves, could have related to Wennerholt accusing Toby Kouns of associating with employees who, as a group, were engaged in poor production and had demonstrated such poor production over a period of time. Instead, without specifically denying Kouns' testimony concerning her failure to be careful of the company she keeps, Wennerholt denied Kouns' alleged assertion that she was being fired for union activity. I conclude that Wennerholt's admonition to Toby Kouns, that the second reason she was being fired was because she failed to be careful of the "company she keeps" has an ominous, rather than an innocent, implication in view of Wenson's identification of the four employees as being the object of his unhappiness because of their distribution of union handbills.

(b) Whereas Wennerholt testified that Patty Kouns apologized and said she was sorry, requesting a second chance to work for Respondent after he notified her that she was being terminated for failure to perform, Wennerholt also testified that Kouns said that she would "stay away from those people" if given another chance. He further testified that he told her that her discharge did not have to do with other people but only because of her failure to do her job. He and Griffith specifically denied any accusation by Patty Kouns that she accused him of being a liar. Wennerholt did not deny telling Patty Kouns that she had a "bad attitude towards the com-

pany." Contrary to the testimony of Griffith and Wennerholt, I credit the testimony of Patty Kouns. She testified that in the presence of John Wenson (Tr. 1002; actually, it was Griffith) who followed her into the room, Wennerholt told her that Respondent had a "little problem:" "You 4 have been timed at doing 2 bags per minute." Patty Kouns testified that Wennerholt did not indicate which four he was talking about (Tr. 1001). It was at that point that she accused him of being a liar and accused anyone who said that she bagged only two bags per minute as being a liar. When she asked who told him that, he said it was John Wenson (i.e., Griffith) who was standing there beside her (Tr. 1002). She reiterated that there was no way that she could bag only two hams per minute. She told Wennerholt that Wenson (Griffith) was lying as well. Wenson (Griffith) never said a word (Tr. 1002).

Aside from the accusation of a "bad attitude," which under the circumstances of Patty Kouns being identified as one of the four against whom Supervisor Wenson harbored animus because of union activities, there is the further identification that the "four of them" had been timed at only 2 bags per minute production. This impliedly corroborates Toby Kouns' testimony concerning Wennerholt complaining, in her discharge interview, over "the company she keeps" and Respondent zeroing in on the four employees.

In short, I regard Wennerholt's statements to Patty Kouns and Toby Kouns concerning "bad attitude" and "be careful of the company you keep," and "you 4 were timed at 2 bags per minute" as particularized identification of employees concerning their union activities and other protected concerted activities. These otherwise ambiguous remarks must be measured against the activities of these employees which create the prima facie case. Wennerholt's statement of these *other reasons* for the discharge ("company you keep," "bad attitude toward the company," "you 4 employees"), demonstrates, I conclude, that in the termination interviews themselves, Respondent had in mind the employees' union activities and other protected concerted activities whatever else Wennerholt mentioned (concerning poor productivity) in the discharge interviews. Such remarks in the discharge interviews, implicating union and concerted protected activities as a motivating factor in the discharge alone create "especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated," *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). While such Wennerholt remarks, the remarks of a high Respondent supervisor, director of human resources for the plant, do not necessarily eliminate the ability of Respondent to prove, under its *Wright Line* and *Transportation Management Corp.* obligations that Respondent would have terminated these employees even in the absence of their protected and union activities, such statements in the discharge interviews themselves, tend to undermine otherwise lawful reasons for the discharges. *Turnbull Cone Baking Co. v. NLRB*, supra.

#### Respondent's defense to the three discharges

Respondent defends the discharge of the three employees on the ground that they regularly failed to perform their production function of bagging hams (90 percent of their work) whenever Supervisor John Wenson left their presence at or near the bagging line. In this regard, as above recounted, group leader Bill Griffith reported these matters to John

that can be said is that Respondent might be bound by knowledge that Ramona Martin brought along two employee witnesses—not that they joined in or supported her written request. Even then, their actions would be to gain the MSDS sheets solely for Martin rather than to have the sheets generally available. The witnesses were engaged in lawful "protected" but not "concerted activity." It is clear, nevertheless, that the three alleged discriminatees' other union and concerted activities render academic the discussion of this issue. Lastly, the evidence does not show that the three employees were discharged solely because of Martin's demands for the MSDS sheets and her coemployees' supporting roles.

Wenson who, after himself observing the phenomenon, reported the matter to his superiors who thereafter observed and timed the employees.

There is also evidence of group leader Hammons and employees Blake and Stone concerning the lack of dedication and slothfulness of the four employees, particularly Sharon McGinnis.<sup>23</sup>

Group leader Bill Griffith, testified that he found these three employees (Patty Kouns, Toby Kouns, and Ramona Martin) to be very poor employees since the first day of their employment. Such was his testimony. It was he, according to coordinator Wenson, who had a particular responsibility to observe and monitor their work on the bagging line. While his testimony is that he counseled the employees concerning their poor production commencing the week of Friday, June 7, 1 week before their discharge, the employees particularly denied that they were ever counseled. In view of their denials, together with the denial of group leader Christine Hale (who, directly contradicting Wenson and Bolio, denied being directed by Wenson or anybody else to counsel the employees at any time), I conclude that contrary to Griffith's testimony, he never counseled them concerning their poor work. Many employees, and indeed Supervisor Wenson, had the opportunity to directly participate in or at least to overhear such counseling. There is not a word in the record, even from employees openly antagonistic to the Union and antagonistic to the three employees, who worked right next to them on the line, who ever heard—actually heard—Griffith counsel the employees concerning their poor work habits in general, or their lack of production in particular. Yet he testified that he repeatedly counseled them on the production line.

Consistent with the testimony of Respondent's witnesses, however, I do not doubt that the three employees, like other employees, from time-to-time failed to produce adequately. Furthermore, I am willing to conclude, as Respondent's witnesses testified, that from time-to-time, the three employees engaged in extensive giggling and conversation which prevented their producing up to the seven or eight hams per minute standard that they were capable of doing. On the other hand, I was influenced by the openly antagonistic, antiunion positions of Respondent's witnesses (group leader Hammons, Blake, Stone, and others) in evaluating such conduct. Consistent with the testimony of Betty Jo McHenry and Patty Kouns concerning Wenson's punishing the entire bagging line by not granting them a work break on June 13 and Griffith telling Patty Kouns that there would be no work breaks until all the hams were bagged, the evidence failed to demonstrate that Respondent's punitive conduct, at least in this regard, was directed against the three employees because of their peculiar failure to perform their jobs. Rather it was directed against employees on the entire bagging line. In short, these three employees, while not production paragons, were not ne'er-do-wells. Certainly the chief of production, David Bolio, did not think they were particularly poor employees. He told the employees, according to Martin's *uncontradicted* testimony (Tr. 814), that they were "good employees" and would not be fired. Indeed Bolio made this statement on Thursday, June 13. This is not only the day be-

fore the discharges; it is a day *after* (he testified) he and other supervisors twice saw them failing to work (Tr. 1671-1673).

In addition, I note that Griffith testified that on three occasions during the week commencing June 5, 1991, he actually cut off production of hams which permitted the bagging of hams on the conveyor belt. He testified, however, that he never reported his actions in stopping the production of hams to any higher authority notwithstanding that he regarded such actions as a serious matter. His original testimony, it seemed to me, was focused on the inability of the three employees to perform their jobs which caused the overflow of hams and his stopping of the production line. His later testimony demonstrated, however, that it might have been not the particular fault of these three employees; rather, it might have been from a cause unknown to him or because of the lack of production of other employees on the line whom he could not observe. Such testimony undermines Respondent's theory that it was these employees who were responsible for all bagging misfortunes.

Lastly, and most significantly, it could not escape my observation that notwithstanding that group leader Griffith had observed these employees to be poor employees from the very date of their employment in mid-May 1991, and notwithstanding that their poor performances never ceased in the period from the date of their employment and training through early June 1991, a period of 3 or 4 weeks, nothing of consequence concerning their continued employment occurred until the week immediately preceding the discharge, i.e., June 7, 1991. Commencing with that date, these three employees, already known to be union activists and the object of Supervisor Wenson's animus because of such union activities, became the object of supervisory attention. It is in that week, June 7 through 13, 2 days before the discharges, that Ramona Martin, Toby Kouns, Brenda Blake, Patty Kouns, and Sharon McGinnis were the subject of observation of their circulating a union petition in the breakroom. Brenda Blake found her position sufficiently uncomfortable that she switched over to the supervisors' table. The next day about 4 p.m., the three employees were engaged in further concerted protected activities, demanding of Supervisor Bolio that the alleged frigid nature of the air-conditioning on the production line be remedied. Thus the original (May 23) and continued (June 12) identification of these three employees engaging in union activities which antagonized their Supervisor Wenson (who, with his superior supervisors, observed the employees engaging in the signing up of new employees on the union petition) was joined with their organizing into a group, protesting adverse working conditions on the bagging line (June 13). These activities, concentrated in the last week of their employment, it seemed to me, led inexorably to their discharge on Friday, June 14, 1991.

The alleged poor production by these employees over an extended period of time prior to June 7 did not escape the notice of group leader Griffith. His failure to report his repeated stopping of the production line, apparently because of the production failures of these employees, demonstrates an awareness of their allegedly inadequate production and a failure to take action. I conclude, that whatever the production

<sup>23</sup> McGinnis, on Respondent's motion, was struck from the case as an alleged discriminatee, as above noted.

shortcomings of these employees,<sup>24</sup> it was known to Respondent well before the week commencing June 7. It was in that week in which they engaged in the union and concerted activities which evidently provoked Respondent. Wenson's and Griffith's June 13 statements to McHenry and Patty Kouns show that the omission of the 10-minute break period and the speed up were designed to punish employees on the bagging line. Respondent, I find, chose for discharge the three union advocates to demonstrate its opposition to the Union and to employees engaged in activities potentially interfering with management of the business. I therefore conclude, whatever the production shortcomings of these employees, Respondent failed to carry its burden under the *Wright Line* equation, as noted in *NLRB v. Transportation Management Corp.*, supra, to prove either a rebuttal of the General Counsel's prima facie case or, alternatively, that the three employees would have been discharged regardless of their union activities. *NKC of America*, 291 NLRB 683 fn. 4 (1988).

Respondent defends, at least in part, on the further ground that the union activities of employees throughout the plant were well known and that Respondent cannot be called to account for its otherwise lawful discharge of these three employees for poor production. The Board rule, however, is that the fact that an employer takes action against only some of the union adherents does not necessarily show that an employer's action was lawful. The failure to include all known union supporters in adverse action does not preclude a finding that unlawful motivation was behind the action with regard to particular employees. *Langston Co.*, 304 NLRB 1022 (1991).

In this case, however, Supervisor Wenson particularized his animus against four employees because they were distributing handbills. The record is barren of any other instance of employer animus directed against particular employees. Moreover, he was not content merely to harbor such animus; he manufactured a "bitch fit" against only those four employees, meanwhile advising other employees that his demonstration of antagonism was directed only at those four employees (for union activities) and not against the other employees whom he regarded as innocent. The undenied, corroborated and credited testimony of Christine Hale and Betty Jo McHenry leaves no other inference possible. Thus, although Respondent's burden under the *Wright Line* defense is only measured by a mere preponderance of the evidence, *Merillat Industries*, 307 NLRB 197 (1992), I find the prima facie case to be not only persuasive; but in view of Supervisor Wennerholt's remarks to Toby Kouns (you've got to watch the company you keep) and Patty Kouns (a "bad attitude" toward the Company and "you four" were timed at two bags per minute) further demonstrates that the allegedly poor production capacity of these four employees, long ob-

served by Bill Griffith, was hardly a substantial reason for the discharges.<sup>25</sup> In short, in the presence of violations of Section 8(a)(1) of the Act demonstrating animus flowing from the highest supervisor in the plant (Messick), and other violations of Section 8(a)(1) of the Act, above-detailed, together with particularized union animus against these three employees (including statements in their discharge interview) and their engaging in concerted protected activities (complaints about working conditions), I find that Respondent has not carried its burden to prove by a preponderance of the evidence either that it rebutted the prima facie case<sup>26</sup> or that it would have discharged these employees for reasons other than their engaging in union and protected concerted activities.

I therefore find that Respondent, in violation of Section 8(a)(3) and (1) of the Act, on June 14, 1991, unlawfully discharged Patty Kouns, Toby Kouns, and Ramona Martin.

<sup>25</sup> I find, in particular, Griffith's earlier three-time halting ham production, if indeed it even happened (it is nowhere corroborated), allegedly because of the poor production of these four employees, an admittedly serious matter, to be significant. Not only were these employees not immediately and severely disciplined, but Griffith never even reported the incidents. Employee misconduct causing a halt in production, according to ordinary industrial usage, customarily is viewed in the harshest terms. In the instant case, poor production led merely to the sequential mustering of the entire Respondent supervisory hierarchy.

The hundred or more pages of testimony devoted to Respondent's chief supervisors engaging in the mid-June surveillance of the production failures of the four employees was not impressive. While group leader Christine Hale's moderate evaluation of the employees was essentially ignored, Respondent's chief supervisors were astounded ("irate") to learn of—and observe—the employees' poor production habits. I do not accept these high-level dumb-shows. Rather, these mezzanine observations by Respondent's entire supervisory hierarchy, together with meetings, covert plans to withdraw Wenson from the work floor, investigations, unanimous vote to terminate, etc. demonstrate that Respondent was building a record. Building a record against what? Four giggling, talkative employees whose alleged production failures were known in late May and caused repeated stoppages in the production line? Instead of firing them on the spot, Respondent erected an elaborate and wholly unconvincing camouflage for its actual motive: to get rid of four employees whose persistent union and protected concerted activities showed them to be troublemakers who could no longer be tolerated.

Further, I regard employee complaints against the three employees' work habits to be consistent with my finding that the work of three employees was not of the highest caliber. But this was long known to Respondent and was not the reason Respondent discharged them.

<sup>26</sup> Respondent left wholly undenied testimony that Supervisor Bolio described the discriminatees as "good employees" but also the credible testimony of Lauretta Holbrook (Tr. 127): that during preelection unlawful interrogation by her supervisor, Barry Forbes, concerning how three coemployees would vote, he told her that he "needed to know . . . because he was getting so much pressure from upstairs, [that] if he didn't find out something, he was going to lose his job." Was "upstairs" directing the unlawful interrogation?

Such testimony should not have gone unchallenged if Respondent seriously sought to maintain its posture of protecting employees rights regardless of their union sympathies and being an implacable opponent of violations of the Act (Messick: Tr. 1848–1850).

<sup>24</sup> Again, Supervisor Bolio never denied characterizing them as "good employees" on June 13, 1 day before the discharge (Tr. 814). I have found that Griffith never "counseled" or warned them. I have also discredited Wenson and Bolio to the extent they testified that they instructed Christine Hale to counsel them. I regard Griffith's self-contradictory testimony (Tr. 1635–1636), on whether he and Christine Hale counseled the employees, to be unintelligible where decipherable. Although Wenson placed the date of Griffith's complaint to him as June 7, Hammons testified she complained of the three employees to Wenson (and Fischer) 2 weeks earlier.

The alleged unlawful discharge of Carl Frank Hale on  
December 11, 1991

*A. Background*

Stephen Smith, hired by Respondent in July 1991, quit in March 1992. He was employed on the packaging line whose supervisor was Jeff Salyers. In or about the end of August 1991, during the 5th or 6th week of his employment, he left work because of illness without permission of his coordinator. He told his group leader, Pam Caraway, about 20 minutes before his 7 p.m. work break that if he felt no better by breaktime he would leave. He told no supervisors of his decision. In fact, he did leave early on that Friday.

When he returned to work on the following Monday, his supervisor, coordinator Salyers, stopped him and directed him to the office of Human Resources Director Wennerholt. In the office, Wennerholt suspended him for 3 days and told him that he would investigate the matter, particularly if Smith had "cause to leave." Wennerholt directed Smith to telephone him on Thursday with regard to the results of the investigation. Smith did so and Wennerholt told him to return to work but first stop into Wennerholt's office. Smith did so. Wennerholt told him to return to work because Respondent could not prove that he didn't have good cause to leave and that Respondent would thereafter notify all employees that if they left without the permission of the supervisor, they would be discharged. Smith testified that he had believed that his advising the group leader that he was going to leave because of illness was a sufficient communication to Respondent; and that the group leader's failure to direct him not to leave constituted permission of Respondent for him to leave. Upon reinstatement, Smith was paid backpay for the 3 days of his suspension. Smith was a prominent supporter of the Union and known to Respondent to be a prominent union supporter (the unfair labor practice charge in Case 9-CA-28666 was served on June 17, 1991).

Consistent with Respondent's experience with Smith, about a week or two after that incident, Supervisor Wennerholt, on or about September 3, 1991, posted a notice to all employees entitled "Clarification of Leaving Work Early Policy" (R. Exh. 2). The memorandum, explaining that an employee's leaving the work line interferes with production, states that employees must receive authorization from "your coordinator" before leaving the work line (emphasis in the original posted notice). The notice continued:

In all future cases, any associate who leaves work without proper authorization from the Coordinator will be considered as having voluntarily quit.

*B. The Employment and Discharge of Carl Frank Hale*

Frank Hale, hired February 1991, was discharged on December 11, 1991. He was a ham trimmer on the converting line whose supervisor (coordinator) was Fred Fischer. The group leader was Elaine Dickerson.

A month before his discharge, on or about November 11, 1991, he left work because he had injured his tailbone. He told coordinator Fred Fischer that he was going to the doctor because of a broken tailbone and Fischer gave him permission to leave. His family doctor told him to take 6 to 8 weeks off; Hale refused, and returned to work on or about November 18, 1991.

Hale and coordinator Fischer were friendly on a social basis, with Hale visiting Fischer's home two to three times per week for a period commencing 9 months before his discharge (and therefore both before and after the union election).

As a matter of coincidence, on November 9, 1991, Hale's wife, Christine Hale, left her workplace without the permission of then coordinator Bill Griffith. She told him that she had to leave early in order to pick up her daughter who was at the baby sitter's. Griffith refused to grant her permission to leave. When she returned to work on November 11 (Monday), she had no conversation with Griffith and resumed work.

Christine Hale, a strong and open union supporter, having failed to receive Griffith's consent, upon her return home, told her husband, that she thought she would be fired for leaving work without permission. She told him that Griffith had warned her that she would be fired if she did not remain at work. She nevertheless left work early. Before returning to work, however, she telephoned Processing Manager Bolio with regard to her future return to work and he told her that as far as he knew she had not been fired. As above noted, she returned to work on November 11, without incident.

The events of Saturday, December 7, 1991

Respondent conceded and stipulated that Respondent had knowledge of Hale as an outspoken union supporter. Indeed, at a preelection September 18, 1991 company-sponsored antiunion meeting, when Hale arose to question Respondent's supervisors and agents concerning their statements, he was told to sit down and shut up. There were no questions being taken at that time. It is undisputed that Hale was a good worker.

Christine Hale testified that on the morning of December 7, before her husband left for work, he complained of pain in his shoulder, his tailbone, and that he was coming down with the flu. She testified that she told him not to go to work. According to Christine Hale, her husband told her that he would go to work and try to "tough it out."

The evidence is in dispute concerning whether and to what extent Frank Hale, on the morning and afternoon of December 7, complained to coemployees concerning the poor condition of his physical condition and, more important, whether and to what extent he complained to coordinator Fischer. Frank Hale testified that at a 9 a.m. break, at lunchtime (11:15 to 12:15) and again at the 3 p.m. break, he told coordinator Fischer that he was feeling unwell; that he was aching all over and that he was thinking of going home. In this third conversation at 3 p.m., Hale testified that Fischer told him that he should not go home and that he had only 45 more minutes of work and that he should remain at work. Fischer testified that the first he heard about Hale's poor physical condition was at 3 p.m. at breaktime, when he saw Hale cleaning his equipment, a clear indication that Hale was finished with work for the day and was not going to continue on the production line.

There is no dispute however, that a few minutes before the 3 p.m. work break, the group leader on the line, Elaine Dickerson, announced to the line employees that they would be taking the break in a few minutes, about 3 p.m. Hale did not deny her testimony that he told her at that time that his shoulder was killing him and that he was going home (Tr.



1373). There was also no dispute that she told him to tell this to coordinator Fred Fischer (Tr. 1373). In response, Hale told her: "No, I'm telling you, I'm going home" (Tr. 1374). A moment later, when Dickerson called the work break, she saw Hale removing his work gear, walking to the water hose to clean up his equipment. She thereafter heard Fischer tell Hale: "Don't go, Frank" (Tr. 1376).<sup>27</sup>

It is unnecessary to resolve the testimony of various General Counsel and Respondent witnesses whether Hale told them of his poor physical condition (tailbone, shoulder, flu-like symptoms) because coordinator Fischer testified that on December 7, with a full complement of 45 employees on the converting line, when the employees went on work break, he saw Hale starting to wash his equipment. Washing equipment signifies the end of work. Fischer admittedly asked him what he was doing. There is no dispute, as Fischer admits, that Hale told him that his shoulder hurt and that he was going home. Fischer told him that there was only 45 minutes of further work left and that he should go on break and then return to work. Fischer credibly testified that Hale continued to wash his equipment. Fischer walked away but then saw Hale walk by him with his newly cleaned equipment. Fischer told him to go on break and not to go home. Hale kept walking. As Hale was walking away, he turned around, smiled at Fischer and, on Fischer's uncontradicted testimony, wiggled his fingers, waving good-bye (Tr. 1834). Fischer told him to come back and said that if he kept going he would be considered a voluntary quit. Hale kept moving, climbed the stairs and merged with a group of 20 or more employees commencing their work break. Fischer followed him up the steps but could not reach Hale. He then found Supervisor Bolio in Supervisor Johnson's office and told them what had happened. Johnson told Bolio to go out and search for Hale but, upon Bolio's return, he notified them that he couldn't find him. Thereafter Johnson told Bolio to make sure that Hale did not return to work without seeing Wennerholt.

#### The discharge of Monday, December 9, 1991

When Hale came to work on the morning of December 9, Fischer told him to go to Wennerholt's office. Wennerholt asked him what happened and why Hale left employment. Wennerholt prepared a written statement from what Hale told him (R. Exh. 5). In the statement, which Hale at the hearing, admitted was correct, he told Wennerholt that he had informed Fischer that his shoulder was killing him and that he was going to leave; that Fischer said that he should not leave and that Hale nevertheless punched out and left any way. He also admitted having seen the posting, knowing the work rule about leaving early, and the requirement of coordinator permission.

Wennerholt testified that he became involved in the Frank Hale matter on December 9, when Fischer told him what happened. He then called in Frank Hale and got his version

of the incident after which he asked Fischer to prepare a statement of what happened. While Hale was in his office, he suspended Hale until he could inquire into the matter. After speaking to and suspending Hale (after first speaking to Fischer), Wennerholt spoke with group leader Elaine Dickerson and Tim Messick.

When, before suspending Hale, Wennerholt asked Hale why he left, he told Wennerholt that he left because his arm was hurting and that he had told Fischer at 3 p.m. he was leaving because his arm was hurting. He also admitted to Wennerholt that Fischer had refused permission but that he had gone anyway (Tr. 1733). Previous to his, when Fischer first told Wennerholt of Hale's leaving the workplace without permission, Fischer allegedly did not tell Wennerholt that Hale had given a reason for his leaving the workplace (Tr. 1734). Specifically, Wennerholt said that Fischer did not tell him that Hale had informed Fischer that he was leaving because of sickness or anything resembling sickness; in substance, Wennerholt said that Fischer told him that Hale "just took off" (Tr. 1735). I find his testimony to be incredible. Fischer himself testified that at 3 p.m., Hale told him that he was leaving because his shoulder hurt.

On December 11, before terminating him, Wennerholt again questioned Hale and asked him if he had gone to the doctor over his illness. Hale told him that he had not but had gone straight home to take his medicine (R. Exh. 6). Wennerholt records Hale as saying that he refused Fischer's offer of light duty "because he did not want to be a 'wimp'" (R. Exh. 6). Actually, Hale told him that the offer of light duty (working on "super trim") was actually no different than that on which he was working but actually rejected the job because it would require him to stand around in 30 degree temperature when he was already freezing. He told Wennerholt "I ain't no wimp but I wasn't going to hurt myself." It was at that point that Wennerholt suspended him for 2 days pending the investigation. At this time, Fischer told Wennerholt that Hale was a good worker (G.C. Exh. 4, p. 10).

On December 11, after Hale told Wennerholt that he had not gone to the doctor, Wennerholt terminated him for violation of Respondent's rule concerning leaving the workplace without the permission of the supervisor.

#### Discussion and conclusions

General Counsel argues (Br. p. 14) that Frank Hale, an outspoken supporter of the Union, was refused a simple request to leave work at the end of his regularly scheduled workday, for no apparent reason. General Counsel argues that the reason was actually Hale's union outspokenness and suggests that Respondent seized upon this opportunity to rid itself of a thorn in its side despite the fact that Respondent regularly allowed employees to leave work on request.

Respondent argues that the Respondent had a published rule which was posted, providing for the discharge of employees leaving work without the approval of the supervisors (R. Exh. 2); that Hale was not only aware of the rule but aware of the consequences of violating the rule; that Hale, disregarding the rule, left without permission in defiance of the rule; and that there was no evidence that the rule was applied inconsistently to Hale, leaving the inference that the motive for such disparate treatment was Hale's union activities.

<sup>27</sup> Dickerson, an openly antiunion witness, admitted that her pretrial statement to the Labor Board asserted that she did not hear the conversation between Fischer and Hale at that time. She testified, and I credit her testimony, that she did not hear Hale ask for an opportunity to leave but heard only what Fischer said to Hale. I credit this explanation of her pretrial statement ("I did not hear that conversation") by her testimony that she did not hear what Hale said to Fischer (G.C. Exh. 5).

Contrary to Respondent's argument (R. Br. p. 27), there was clear proof of a prima facie case that Respondent knew of Frank Hale's open support of the Union; and I have already found that Respondent not only violated Section 8(a)(1) of the act by various undenied coercive interrogation, threats and other conduct, but also discharged three employees because of their union and concerted activities in violation of Section 8(a)(3) and (1) of the Act, supra.

On the other hand, as Respondent argues, I find the following factors dispositive on the question of actual motivation and the lawfulness of Respondent's discharge of Frank Hale on December 11, 1991.

(a) If Fred Fischer harbored substantial union animus against Frank Hale and was awaiting an opportunity to "get" him, it is difficult to explain why, on November 11, 3 weeks before the events leading to the discharge, Fischer gave Hale, at Hale's request, express permission to leave work for alleged illness within minutes of the start of his work shift (Tr. 314, 394). That November 11 event would have offered Fred Fischer earlier opportunity, under similar circumstances, for unlawful mischief.

(b) Both Frank Hale and his wife, group leader Christine Hale, were outspoken, known union supporters and advocates. Fischer granted Frank Hale time off to see the doctor on November 11, 1991. Two days before, on or about November 9, 1991, Supervisor Bill Griffith refused Christine Hale's request to leave the production line in order to pick up her daughter from her babysitter. When Christine Hale nevertheless left without permission, she reported for work on November 11 without suffering any adverse consequences. Christine Hale's conduct of November 9 offered to Respondent, and particularly Supervisor Bill Griffith (who was intimately engaged in unlawful activities with then—coordinator of the curing line, John Wenson) an opportunity to retaliate against a known, open union sympathizer. No retaliatory action by Respondent was taken against Christine Hale. If this constitutes disparate treatment, the disparity was not derived from discrimination between employees based on their union activities or sympathies.

(c) When, at 3, on December 7, Frank Hale told Supervisor Fischer that he was leaving, he testified that he told Fischer that he was aching, coming down with something and could hold up no longer (Tr. 429-430). Fischer responded: "No"; Hale said, "I'm leaving"; Fischer responded, "No"; Hale again responded "I'm leaving"; and Fischer answered again: "No." Thus, after Fischer had three times told him not to leave, Hale testified that he went over to the timeclock, punched out and left the plant (Tr. 430). I have found particularly significant, among the undisputed facts in this confrontation, Fischer's testimony with regard to what occurred immediately subsequent to his repeated refusal to give Hale permission to leave.

Fischer told Hale to stick it out for 45 minutes and that they would be finished work for the day. Hale said nothing but continued washing his equipment at which point Fischer returned to his desk. It is undenied that Hale then passed Fischer at the desk, Fischer again told him not to leave and that, if he left, it would be considered a voluntary quit. It was at this point that Hale passed Fischer's desk. He then turned around, smiled and wiggled his fingers waving goodbye (Tr. 1834). Such testimony, it seems to me, demonstrates, as sometimes words fail to demonstrate, that

Hale's action was not only deliberately contrary to the rule requiring the supervisor's permission to leave, but was an attempt to flaunt and dramatize Hale's contempt for Fischer's supervisory authority. In this regard, it renders irrelevant the actions of other supervisors in granting or refusing permission to leave.

Here, Hale was taunting his supervisor and his supervisor's authority in refusing to grant permission to leave. Respondent speculates that Hale might have thought that he would get away with this behavior because of his close ties to his wife, Christine Hale, a "valued group leader" (R. Br. p. 24)<sup>28</sup> and because he was an admitted "drinking buddy" of his Supervisor, Fred Fischer. In this same regard, Hale's conduct, at least in part, colors the issue of whether Fischer's failure to grant Hale permission to leave was so inexplicable and unduly harsh as to implicate a possible other motive for such inexplicable and harsh refusal. While it is true that Fischer had already refused to grant Hale the sought permission to leave the workplace at the time that Hale wiggled his fingers, an insubordinate gesture of farewell, it would demonstrate, contrary to Respondent's argument of Fischer's drinking-buddy friendship with Hale, a motive by which Fischer would pursue Hale's taunting farewell by seeing to it that Hale would be discharged.

(d) In addition, Respondent argues that the lengthy time delay between Respondent's September 18 direction to Hale to sit down and shut up at its antiunion meeting, to the alleged discriminatory December 11 discharge, militates against an inference of unlawful motive. Respondent argues that its September 18 impatient demonstration against Hale's union activity was not implicated in its December 11 discharge, 2 months later. The longer the delay between demonstrations of unlawful conduct and the alleged discrimination, the weaker the inference that union or protected activity lay at the heart of the later alleged unlawful action. Compare: *Salvation Army Residence*, 293 NLRB 944, 982 (1989), with *Inner City Broadcasting Corp.*, 281 NLRB 1210, 1223 (1986). In those cases, delays of 1 and 3 months, respectively, tended to indicate an absence of unlawful motivation.

To be sure, I was not satisfied with the accuracy, and indeed the veracity, of much of Wennerholt's testimony with regard to the discharge of Frank Hale. His report of Fischer's testimony—that Hale just "took off" was incredible. On the other hand, although the matter was not dispositive, I believe that Frank Hale's inability to recall certain circumstances and many of the persons to whom he complained of illness that day, militates against his credibility, suggesting a lack of serious impairment. In sum, however, I believe that notwithstanding the existence of a technical prima facie case, yet, the timing and other circumstances surrounding the discharge demonstrates that Respondent has supported its burden of proof under *Wright Line*, supra, that it suspended and thereafter discharged Frank Hale regardless of his union activities. I make this finding notwithstanding Respondent's demonstration, in other circumstances, of antipathy against employees for engaging in such activities. Respondent's *Wright Line* defense is established merely on proof of a preponderance of the evidence. *Merillat Industries*, 307 NLRB 1301 (1992). Under these circumstances, I am unable to draw an inference

<sup>28</sup> Her opinion, however, was not "valued" in the discharge of Martin, and the two Kounsens, above.

that the actual motivation for the discharge of Frank Hale on December 11 was discriminatory, based on his union activities. I therefore recommend to the Board that the allegations of the December 9 suspension and the December 11, 1991 discharge of Frank Hale be dismissed.

General Counsel's evidence of disparate treatment by Fred Fischer is not persuasive. Michael Holbrook, for instance, a known union supporter and solicitor of signatures, was twice given permission to leave by Fischer in November due to illness. On December 7, the same day Fischer refused Hale, he gave Holbrook permission to leave early to transport his wife by car. But Holbrook had received Fischer's permission the day before (December 6) to leave early on December 7. Whether Holbrook's departure left Fischer short-handed on December 7 was not mentioned. If Fischer discriminated between Holbrook and Hale on December 7, however, it was not shown to be based on disparate union sympathy. They were both known to be prounion.

#### CONCLUSIONS OF LAW

1. Cook Family Foods, Ltd. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Firemen and Oilers, AFL-CIO (the union) has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging, on June 14, 1991, its employees Ramona Martin, Toby Kouns, and Patty Kouns because they, and each of them, engaged in union and other protected concerted activities, and in order to discourage employees from engaging in such activities, Respondent has unlawfully discriminated against each of them and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. In the period commencing on or after June 17, 1991, Respondent, by requiring employees to wear insignia to demonstrate their loyalty to Respondent against the Union, by engaging in unlawful surveillance of its employees' union activities; by physically accosting an employee because of the employee's union sympathies; by coercively interrogating employees concerning their union activities, support and sentiments; by recording the names of union supporters; by impliedly threatening employees with unspecified retaliation because of their engaging in union activities; and by threatening employees that it would relocate its facilities if the employees selected the Union as their bargaining representative, Respondent thereby violated Section 8(a)(1) of the Act.

5. Respondent has not committed any other unfair labor practices.

#### THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend to the Board that it order Respondent to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. In addition to posting notices which will prohibit repetition of Respondent's

independent violations of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent expunge from its files the discharge memoranda supporting the discharges of Ramona Martin, Patty Kouns, and Toby Kouns and all reports and other documents concerning such discharges of June 14, 1991. I shall also recommend that Respondent notify them, in writing, of this action and that these documents will not support any further discipline against any of them. Furthermore, I shall recommend that Respondent be obliged to offer reinstatement to each of the three named discriminatees to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority and any other rights and privileges previously enjoyed and to make each of them whole for any loss of earnings and benefits suffered because of the unlawful June 14, 1991 discharges less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 233 NLRB 1173 (1987).

I shall also recommend to the Board, since the three named discriminatees were also the subject of Respondent's voting challenges in the September 20, 1991 Board-conducted election, that those challenges be overruled; that the ballots of these employees be opened and counted; and a new and amended corrected tally of ballots be drafted and served on all parties to this proceeding. Furthermore, I shall recommend to the Board that, in view of the finding of independent violations of Section 8(a)(1) of the Act which, as the parties stipulated at the hearing, track the election objections filed by the Union in Case 9-RC-15900, that such objections be sustained. In the event that the new and amended tally of ballots demonstrates that a majority of the valid votes cast were cast in favor of the union, I recommend that the Regional Director, Region 9, upon the Board's approval of the enclosed recommended Decision and Order, relating to the three discharges and resulting challenges, issue forthwith his Certification of Representative of the Union. Moreover, in view of my sustaining the objections to the election, I shall additionally recommend to the Board that, in the event that the new and amended tally of ballots demonstrates that a majority of the valid votes cast has not been cast in favor of the union, the election in Case 9-RC-15900 be set aside and that a new election be held whenever the Regional Director finds that the circumstances for such new election are just and proper.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>29</sup>

#### ORDER

The Respondent, Cook Family Foods, Ltd., Grayson, Kentucky, its officers, agents, successors, and assigns, shall

<sup>29</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees in order to discourage them from supporting International Brotherhood of Firemen and Oilers, AFL-CIO (the Union) or any other labor organization, or because its employees engage in activities protected by Section 7 of the Act.

(b) Threatening employees that it will relocate its Grayson, Kentucky facility if the employees select the Union, or any other labor organization, as their bargaining representative; requiring employees to demonstrate, by the wearing of insignia, their loyalty to Respondent and against the Union; impliedly threatening the employees with unspecified retaliation for engaging in union activities; recording the names of union supporters; coercively interrogating employees regarding their union sentiments and activities; physically accosting employees because of the employees' union activities; and engaging in unlawful surveillance or the employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Toby Kouns, Patty Kouns, and Ramona Martin immediate and full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole, with interest, for any loss of earnings and benefits each of them may have suffered as a result of Respondent's unlawful discharge of these employees on June 14, 1991, as set forth in the remedy section of this decision.

(b) Expunge and remove from its files any memoranda, records, or other references to the unlawful discharges of Patty Kouns, Toby Kouns and Ramona Martin of June 14, 1991, and notify each of them, in writing, that this has been done and that these disciplinary actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Grayson, Kentucky, copies of the attached notice marked "Appendix."<sup>30</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>30</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS ORDERED that Respondent's challenges to the ballots of Toby Kouns, Patty Kouns, and Ramona Martin in Case 9-RC-15900 be, and hereby are, overruled; that the Union's objections to the election are sustained.

IT IS FURTHER ORDERED that Case 9-RC-15900 be severed and remanded to the Regional Director for Region 9; that the ballots of Toby Kouns, Patty Kouns, and Ramona Martin be counted and that the Regional Director, Region 9, shall issue a further amended corrected revised tally of ballots in Case 9-RC-15900, with service thereof on all parties.

IT IS FURTHER ORDERED that if the further amended corrected revised tally of ballots shall demonstrate that a majority of such valid votes, including the votes in the erstwhile challenged ballots, shall be cast for International Brotherhood of Firemen and Oilers, AFL-CIO (the Union), the Regional Director shall, upon adoption by the National Labor Relations Board of this recommended Order relating to such challenged ballots, forthwith issue a Certification and Representative in favor of International Brotherhood of Firemen and Oilers in the unit specified in the aforesaid representation case.

IT IS FURTHER ORDERED that if the number of valid votes cast does not then demonstrate a majority for the Union, then the election in Case 9-RC-15900 be set aside; and that the aforesaid Regional Director conduct a second election at such time and place as he deems circumstances afford a free choice of a bargaining representative in the appropriate unit.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discipline employees because they engage in union or protected concerted activities for the purposes of collective bargaining or other mutual aid or protection in the exercise of their rights guaranteed under the National Labor Relations Act.

WE WILL NOT engage in unlawful surveillance of our employees' union activities or physically accost employees because of their union activities or sympathies; coercively interrogate employees concerning their union sentiments or the sentiments of other employees or record the names of union supporters; nor will we require employees to wear insignia showing support of an antiunion position; nor impliedly threaten employees with unspecified retaliation for their engaging in union activities; nor will we threaten employees that we will relocate our facility in Grayson, Kentucky if the employees select International Brotherhood of Firemen and Oilers, AFL-CIO or any other labor organization, as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Toby Kouns, Patty Kouns, and Ramona Martin immediate, full and unconditional reinstatement of their former positions of employment or, if those jobs no

longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges; and WE WILL make each of them whole, with interest, for any wages or other benefits each of them may have lost as a consequence of our unlawful June 14, 1991 discharge of these employees.

WE WILL notify each of the employees that we have removed and expunged from our files any references to their unlawful discharges on June 14, 1991, and that these memoranda of discipline will not be used against them in any way.

COOK FAMILY FOODS, INC.